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135 A/C

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OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

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g Court, Allahabad .... W. K. PORTER, *Gray's Inn.*
B. K. MUKERJEE, M.A., LL.B., *Vakil, High Court.*

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——1860—XLV—(INDIAN PENAL CODE], SECTION 182—*False information given to the Police with the object of having a charge brought against a certain person.*] Where a person falsely gave information to the Police that a horse belonging to him had strayed, when in fact he had sold it some time previously, and did this with the intention that a charge should be brought against the purchaser.

Held that the giver of such information was rightly convicted under section 182 of the Indian Penal Code.

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——————, SECTIONS 380 AND 392—*Robbery—Sentence of fine only not legal—Principles guiding the infliction of a sentence of whipping.*] For an offence under section 390 of the Indian Penal Code it is not permissible to award a sentence of fine only without imprisonment.

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Where one such lease for five years had expired and a fresh lease for a similar period had been granted to another thekadar, it was *held* that a person who was holding over on some kind of an arrangement with the former lessees was in the position of a mere trespasser, and it was not necessary for the new lessees to serve him with a formal notice of ejectment.

Baijnath v. Muhammad Ismail 677

ACTS—1867—III (PUBLIC GAMBLING ACT), SECTION 13—"*Public place*"—*Grove to which public commonly have access in fact, although it is the subject of private ownership*] A place to which the public have access, without their access being refused or interfered with, is a public place, within the meaning of Act No. III of 1867, whether the public have a right to go there or not. *Queen-Empress* v. *Sri Lal*, I. L. R., 17 All., 186, followed. *Queen* v. *Wellard*, 24 Q. B. D., 63, referred to. *Ahmad Ali* v. *King-Emperor*, 1 A. L. J., 129, distinguished.

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——1869—I (OUDH ESTATES ACTS), 23—*Succession*—"*Ordinary law*"—*List 4—Male primogeniture sanad—Custom—Succession of widows—Evidence—Instances prior to sanad—Act No. XV of 1860 (Crown Grants Act), section 3*] An Oudh talukdari estate was held under a male primogeniture sanad granted in 1863, and had been entered in list 4 prepared under section 8 of the Oudh Estates Act, 1869, that list comprising those talukdars to whom section 23 was applicable. By section 23 intestate succession, except in cases provided for by section 22, is to be "regulated by the ordinary law to which members of the intestate's tribe and religion are subject" Upon the death of the holder in 1907, intestate, his widow took possession, the appellant, who was the heir according to the sanad, sued her and other members of the family to establish his title

Held (1) that the words 'the ordinary law' in section 23, like the similar words in section 22, clause (11), included the rule of succession laid down in the sanad by which the estate had been granted, (2) that evidence of instances of widows having succeeded prior to the sanad could not be used to set up an existing rule of succession directly contrary to the terms of the sanad, having regard to section 8 of the Crown Grants Act, 1895, further, that a single instance later than the sanad was wholly insufficient to establish a custom in a branch of the family different from that in which it had occurred, and (3) that the appellant succeeded.

Dictum in *Braj Indar Bahadur Singh* v *Janki Koer*, L. R., 5 I. A., 1, 13, and *Parbati Kunwar* v *Chandika Pal Kunwar*, L. R., 35 I. A., 125, explained

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——1870—VII (COURT FEES ACT), SECTION 4—*Letters Patent Appeal from decision of single Judge—Court fee*] *Held* that no court fee is leviable on an appeal under section 10 of the Letters Patent of the Allahabad High Court from the judgment of a single Judge of the Court.

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——, SECTION 7, SUB-SECTION (iv) (f)—*Suit for accounts—Appeal against preliminary decree—Court fee.*] Where the defendant in a suit for accounts appeals against a preliminary decree passed against him, he is entitled to put his own valuation on his memorandum of appeal and pay the court fee on that valuation. He is not bound to accept the valuation given by the plaintiff in his plaint

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Bhola Nath v. *Parsotam Das*, I. L. R., 32 All., 517, referred to. *Dhupati Srinivasacharlu* v. *A. Perindevamma*, 30 M. L. J., 402, doubted.

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ACTS—187.—VII—(COURT FEES ACT), SECTION 7(v), (a), (b)—*Court fee—Suit by a member of a joint Hindu family to avoid a sale of ancestral property—Nature of relief to be asked for—Appeal.*] In a suit where a member of a joint Hindu family seeks to avoid the effect of a private sale of ancestral property executed by other members of the family, the plaintiff need not ask for any other relief than possession of the property sold: he is not bound to ask for cancellation of the sale-deed; but if he does so he will have to stamp his plaint according to the full value of the property sold, unless he is permitted by the Court to amend his plaint.

The case of the defendants' appeal against a decree in favour of the plaintiff in such a suit is, however, different, and they are entitled to value their appeal, for the purposes of the Court Fees Act, under section 7(v) (a) of the Act.

Raja Dhakeswari Prasad v. *Jivo Chaudhry*, 3 Patna L. J., 148, distinguished.

Rup Narain v. Bishwa Nath Singh 629

———)1871—XXIII (PENSIONS ACT), SECTION 7—*Attachment of pension—Allegation that pension is attachable under section 7 of the Act—Burden of proof.*] If a decree-holder seeks to attach and bring to sale a pension payable to the judgment-debtor, which would usually be exempt under the provisions of Act No. XXIII of 1871, it is his duty, if his case is that the pension belongs to that class which is referred to in section 7 of the Act, to set out the facts and prove his case.

Mazhar Ali Khan v. Mahfuz Hasan 697

———, SECTIONS 11 AND 18—*"Pension"—Endowment founded by the Emperor Akbar, inter alia, for the maintenance of the descendants of Shaikh Salim Chishti.*] *Held* that an allowance payable to one of the descendants of Shaikh Salim Chishti out of the income of an endowment founded by the Emperor Akbar and continued by the British Government was a "pension" within the meaning of section 11 of the Pensions Act, 1871, and therefore not assignable. *Secretary of State for India in Council*, v. *Khemchand Jeychand*, I. L. R., 4 Bom., 432, followed.

Harnam Das v. Fajyani Begam 864

———1872—I (INDIAN EVIDENCE ACT), SECTION 70—*Attested document—Admission of execution in course of suit—Summoning of attesting witnesses not necessary.*] Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document attestation of which is required by law. *Jogendro Nath* v *Nitai Churn*, 7 C. W. N., 384, and *Abdul Karim* v. *Salaman*, I. L. R., 27 Calc., 190, referred to.

Asharfi Lal v. Musammat Nannhi 127

———, SECTION. 92—*Evidence—Admissibility of—Promissory note—Subsidiary agreement that payment was not to be demanded until settlement of accounts.*] *Held* that the executant of a promissory note could not be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties.

Sri Ram v. Sobha Ram, Gopal Rai 521

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ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92, *See* Civil Procedure Code (1908), order XXI, rule 2(2) 258

———, SECTION 92, PROVISO (1)—*Mortgage deed—Misdescription of property mortgaged—Admissibility of evidence to show what really was the property which the parties intended to be mortgaged.*] By a deed executed in 1892 certain items of property were mortgaged, including a share in khata No. 3 in mahal Ismail Beg. The mortgage was renewed in 1897 and in the second deed the words "mahal Ismail Beg" were omitted in the schedule of the properties mortgaged. The mortgage was again renewed in 1907, when in the corresponding part of the schedule there was entered an item "khata No. 3 in mahal Jafar Beg."

Held that it was open to the mortgagee to offer evidence to show that what was intended to be mortgaged was a share in mahal Ismail Beg, khata No. 3, and in so doing to refer to the two previous deeds

Abdul Hakim Khan v. Ram Gopal 246

———, SECTION 92, PROVISOS (2) AND (3)—*Evidence—Admissibility of—Registered deed of relinquishment of part of lease-hold land—Contemporaneous oral agreement regarding payment by landlord of a certain sum*] Plaintiff was a *garjoidar* with a holding of 1 bigha 15 biswas at a rental of Rs 40 per annum. He executed and registered a deed of relinquishment by which he gave up 17 biswansis of his holding and agreed to pay Rs. 21 as rent for the remaining land. The landlord on his part entered into an oral agreement to pay to the plaintiff Rs. 200, out of which Rs. 82 were to be credited in settlement of certain arrears of rent due. The landlord, however, sued for the arrears and obtained a decree. Plaintiff then sued for recovery of Rs 200 under the above mentioned oral agreement.

Held that plaintiff was not precluded by reason of the existence of the registered deed of relinquishment from giving evidence of the oral agreement under which he claimed. *Abdul Hamid* v *Abdul Majid*, 11 A. L. J., 770, *Ram Bakhsh* v *Durjan*, I L. R., 9 All., 393, and *Motabhoy Mulla Essabhoy* v. *Mulji Haridas*, I. L. R., 32 Bom., 399, referred to.

Badal Ram v Jhulai 53

———, SECTION 92, PROVISO (3)—*Evidence—Admissibility of parol evidence to qualify the terms of a document in writing.*] *Held* on a construction of proviso (3) to section 92 of the Indian Evidence Act, 1872, that a distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent to a defeasance. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event.

Ramjiban Serowgy v. *Ogbore Nath Chatterjee*, I. L. R., 25 Calc., 401, and *Vithu Jairam* v *Akaram*, 42 Indian Cases, 372, referred to.

Ali Jawad v. Kulanjan Singh 421

———, SECTION 112—*Presumption—Burden of proof*] Plaintiff sued for the recovery of a large amount of property, the basis of his claim being that he was the son of a certain lady, but he failed to prove the parentage alleged, or even that his alleged mother had given birth to any child on or about the date specified as that of his birth. The respondents, on the other hand, failed to prove the case that they set up, which was that the plaintiff was of an entirely different parentage.

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Miles v. *New Zealand Alford Estate Company*, L. R., 32 Ch. D., 266, referred to.

Gulab Chand v Kamal Singh 424

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 56 AND 65—*Lease—Property leased compulsorily acquired by Government—Right of lessee to obtain compensation from lessor.*] If during the continuance of a lease of immovable property the subject of the lease is compulsorily acquired by Government under the provisions of the Land Acquisition Act, 1894, performance of the contract having thereby become impossible, the lessee is entitled to obtain from the lessor compensation for the loss which he has sustained in consequence of being deprived of the possession of the demised premises. *Dhuramsey Soondersee* v. *Ahmedbhoy Habibbhoy*, I. L. R., 23 Bom., 15, referred to.

Muhammad Hashim v. Misri Lal 220

———, SECTION 60, *See* Act No. IV of 1882, sections 74 and 95 67

———, SECTION 63—*Accord and satisfaction—Cheque for smaller amount than sum due sent as payment in full and cashed by creditor.—Creditor not bound to accept it, if at all, as payment in full.*] Where the debtors, knowing that the creditors claimed a certain amount, sent them a cheque for a smaller sum, with a condition that it was to be taken as in full satisfaction of the claim, and the creditors cashed it and then wrote intimating that they did not agree to the condition, it was *held* that the acceptance of the cheque by the creditors was not a conclusive proof of acceptance of the condition and did not preclude them from suing for the balance of their claim. *Miller* v *Davies*, not reported, referred to in 22 Q. B. D., 610, referred to.

Bandeo, Ram Saxup v. Dilsukh Rai, Sewak Ram, I. L. R., 14 All. 715

———, SECTION 149, *See* Act No. IX of 1890, sections 27, 54 and 72 218

———, SECTION 151—*Hotel-keeper—Liability of hotel-keeper for safe custody of property of guests.*] The liabilities of a hotel-keeper to his guests are regulated by the Indian Contract Act, and in the absence of any specific agreement in a given case, the rules in Chapter IX of that Act will apply.

Where, therefore, the property of a guest at a hotel was stolen from his room while he was at dinner in a different part of the hotel building and it was found that the room occupied by him was to the knowledge of the hotel-keeper in an insecure condition, which the latter had taken no steps to rectify, it was *held* that the hotel-keeper was liable. *Rampal Singh* v. *Murray Co*, I. L. R., 22 All., 164, referred to.

Jan & Son v. Cameron, I.L.R., 14 All. 735

———1873—(INDIAN OATHS ACT), SECTION 11—*Pre-emption—Custom—Offer of guardian of minor defendant to be bound by oath of plaintiff—Extent to which minor is bound thereby—Wajibularz—Perfect partition—Survival of custom of pre-emption.*] In a suit for pre-emption the guardian *ad litem* of one of the defendants, who was a minor, agreed that if the plaintiff, holding Ganges water in his hands, took an oath that he had not refused to take the property in suit before the sale-deed was executed, then his suit should be decreed. The plaintiff took the oath and swore that no offer had ever been made to him and that he had not refused to purchase the property. *Held* that so far as the statement of fact—that the plaintiff had not refused to purchase the property—was concerned

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ACTS—1881—XII (N.-W. P. RENT ACT), SECTION 9, *See* Act (Local) No. II of 1900, section 22 327

——1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTIONS 4, 26 AND 27, *See* Hindu law 398

——, SECTIONS 64 AND 76—Hundi *drawn by drawer on himself—Presentation for payment not necessary.*] The fact that the drawer and the drawee of a *hundi* are same person will not make the *hundi* a promissory note, but in such case no presentation on due date is necessary, as from the nature of the case the drawer cannot suffer damage from the want of such presentation.

Pachkauri Lal v. Mul Chand 554

——1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTION 78—*Promissory note—Suit on note not maintainable by* benamidar.] The provisions of the Negotiable Instruments Act, 1881, do not admit of a suit being brought upon a promissory note by a *benamidar* whose name does not appear upon the document. *Dork Lal* v. *Sewak Ram*, 13 A. L. J., 685, and *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*, I. L. R., 28 Mad., 205, followed. *Gurumurti* v. *Sivayya*, I. L. R., 21 Mad., 391, dissented from.

Reoti Lal v. Manno Kunwar 200

——1882—IV (TRANSFER OF PROPERTY ACT), SECTION 41—*Ostensible owner—Manager left in charge of property the owner of which had gone on a pilgrimage.*] Plaintiff, who was the owner of a house in Cawnpore, went on a pilgrimage to Mecca, leaving the house in charge of an agent. When the plaintiff had been absent about three years, the agent got his own name entered on the Municipal register in place of the owner, and thereafter sold the house as his own. Plaintiff returned before the expiration of six years from her departure and sued for recovery of possession.

Held that the vendor could not be considered as an "ostensible owner" within the meaning of section 41 of the Transfer of Property Act, 1882, and the plaintiff was entitled to a decree. *Jomna Das* v. *Uma Shankar*, I. L. R., 26 All., 308, *Mowanji Muncherji Cama* v. *The Secretary of State for India in Council*, 19 C. W. N., 1058, and *Partap Chand* v. *Sayida Bibi*, I. L. R., 28 All., 442, referred to.

Muhammad Sulaiman v. Sakina Bibi 674

——, SECTION 51—*Alienee from Hindu widow without legal necessity—Improvements made by alienee on land so obtained.*] A Hindu widow mortgaged with possession certain property which had been of her deceased husband—as was subsequently found—without any legal necessity for so doing, and the mortgagee proceeded to erect a house on the land so mortgaged. The mortgagor died, and her co-widow, on whom the mortgaged land devolved by survivorship, sued for possession and for removal of the house.

Held that the mortgagee was not entitled to claim the benefit of section 51 of the Transfer of Property Act, 1882. A person dealing with a Hindu widow would ordinarily know that she has only a life interest and he can reasonably be expected to make inquiries as to whether there is any legal necessity for the transfer in his favour. *Raja Ras Bhagwat Dayal Singh* v. *Ram Baksh Sahu*, 20 A. L. J., 26, distinguished.

Hans Raj v. Musammat Sonni 666

——, SECTION 58, *See* Act No. V of 1920, sections 4, 5 and 75 (2) 71

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If, by reason of delay in the appointment of a guardian *ad litem*, the original deposit has become insufficient, an additional sum may be deposited. *Deo Dat* v. *Ram Autar* I. L. R., 3 All., 502, referred to.

STUART, J., *contra*. Every such case should be looked at upon its merits. But, speaking generally, a mortgagor has done all that has to be done by him when he deposits the sum due on the date of the deposit, when he presents a duly verified petition and when he states to the best of his knowledge and ability the correct address of an adult mortgagee and proposes, in the case of a minor mortgagee, a suitable person as guardian *ad litem*. To ask him to see that a guardian *ad litem* is appointed is to ask him to do something which it is not in his power to do.

Kannu Mal *v.* Indarpal Singh 102

ACTS—1882—[V (TRANSFER OF PROPERTY ACT), SECTIONS 83 AND 101—*Mortgage—Tender—Mortgage executed in the name of a minor member of a joint Hindu family, though in reality a family transaction, the mortgage money being supplied from the joint family funds.*] A mortgage was executed in favour of a minor member of a joint Hindu family. The mortgagor paid the mortgage money into court and asked for service of notice on "Ram Lagan, minor, under the guardianship of his father Mahadeo Das," and notice was issued accordingly; but all that was done was that the notice was affixed to the door of the house and the serving officer reported that he was not able to effect personal service on either the minor or his father. No application was made by the mortgagor for the appointment of a guardian *ad litem*.

Held that no valid payment had been made within the meaning of section 83 of the Transfer of Property Act, 1882, so as to stop the running of interest. *Pandurang Babu Parab* v. *Mahadaji Moreshwar Gokhale*, I. L. R., 27 Bom., 23, referred to.

Where, however, a mortgage, though executed in the name of a minor member, is in reality a mortgage taken by the head of a joint Hindu family, the mortgage money being supplied from the joint family funds, it may well be held that an offer to pay the money due on such a mortgage to the managing member is a good and valid tender in the eye of the law.

Sheo Saran Chaudhri v. Ram Lagan Das 64

——————, SECTION 101—*Mortgage—Position of prior mortgagee who has acquired the rights of his mortgagor.*] The shield of a subsequent mortgagee who acquires the rights of a prior mortgagee is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor, or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation. *Gokaldas Gopaldas* v. *Purannal Premsukhdas*, I. L. R., 10 Calc., 1035, *Laxman Ganesh* v. *Mathurabai*, I. L. R., 38 Bom., 369, and *Baldeo Prasad* v. *Uman Shankar*, I. L. R., 32 All., 1, referred to. *Adhan Kutti* v. *Kuttanat*, 37 Indian Cases, 706, and *Mafi-ullah Khan* v. *Banwari Lal*, I. L. R., 32 All., 183, distinguished.

Ram Sarup v. Ram Lal 659

——1882—V (INDIAN EASEMENTS ACT), SECTION 43—*Easement—Burden on servient owner increased by action of dominant owner—Remedy of servient owner—Easement not necessarily extinguished.*] A, the owner of two adjoining houses, had a privy in one, the

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 60 AND 98.
See Mortgage 195

———————————, SECTIONS 74 AND 95—*Act No. IX of 1872 (Indian Contract Act), section 60—Mortgage—Effect of satisfaction of puisne mortgagee's decree by puisne mortgagee—Charge—Suit by puisne mortgagee to recover money so paid—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 61 and 132*] Where a second mortgagee discharges a decree obtained by the first mortgagee, he acquires a charge on the mortgaged property as from the date upon which he made payment in satisfaction of the decree, as well as a right to be reimbursed by the mortgagor personally, but he is in no sense an assignee of either the mortgage or the decree *Gopi Narain Khanna* v. *Bansadhar*, I. L. R., 27 All., 825, referred to. *Nathuram* v. *Sheo Lal*, 42 Indian Cases, 796, dissented from.

Shib Lal v. Munni Lal 67

———————————, SECTION 82—*Mortgage—Integrity of mortgage broken up—Parts of the mortgaged property purchased by prior and subsequent mortgagees—Rights of purchasers inter se*] Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part, but where the rights of the mortgagor have vested partly in a prior mortgagee and partly in a subsequent mortgagee, as a result of a suit brought by each of them to enforce his mortgage without impleading the other, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired

Amba Prasad v. Wahid-ullah, I. L. R., 44 All. 708

———————————, SECTIONS 83 AND 84—*Full deposit made by mortgagor, but refused by mortgagee and subsequently withdrawn by mortgagor—Interest*] When once the full amount due on a mortgage has been paid into court under the provisions of section 83 of the Transfer of Property Act the running of interest stops, and this is not affected by the withdrawal of the deposit by the mortgagor after refusal of the mortgagee to accept it. *Velayudu Naicker* v. *Hyder Hussain Khan Saheb*, I. L. R., 13 Mad., 130, followed

Hukam Singh v. Babu Lal 196

———————————, SECTIONS 83, 84 AND 108—*Mortgage—Deposit of mortgage money—Procedure necessary when the mortgagee is a minor*] On a construction of sections 83 and 84 of the Transfer of Property Act, 1882.

Held by LINDSAY, J. (STUART, J., *dissentiente*) that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the Court and must bring before the Court some person who is willing to act as guardian, or, failing that, he must satisfy the Court in whatever way he can that there is no person to his knowledge who is willing to accept the duties of a guardian In that case he can ask the Court to take action under order XXXII, rule 4, of the Code of Civil Procedure. *Pandurang Babu Parab* v. *Muhadaji Moreshwar Gokhale*, I. L. R., 27 Bom., 28, and *Shivnath Singh* v *Manohar Lal*, 16 Cudh Cases, 201, referred to.

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water from which flowed on to the land of *B*, and as to this there existed an easement in favour of *A*. But *A* built a new privy in the second house, and connected the drains of the two so that the amount of water discharged over *B*'s land was largely increased. *B* then blocked up the channel through which the water came on to his land.

Held, on suit by *A* to have this obstruction removed, that section 48 of the Indian Easements Act, 1882, did not apply, and the dominant owner did not lose his easement altogether through the action which he had taken, but that the *status quo ante* both could and should be restored. *Harris* v. *Flower and Sons*, 91 L. T., 816, referred to.

Rameshwar Dayal v. Maharaj Charan 343

ACTS.—1882—V (INDIAN EASEMENTS ACT), SECTION 59—*Licence—Power to cancel licence—Licence for erecting thatched sheds not appurtenant to holding of licensee.*] Certain tenants, with the permission of their zamindar, erected some thatched sheds on waste land belonging to the zamindar. Neither the land nor the sheds were appurtenant to the tenants' agricultural holding. After these sheds had been in existence for some twenty years, the zamindar was sold to the plaintiff. *Held* that the plaintiff was not debarred from cancelling the licence in pursuance of which the sheds had been erected.

Bhoj Raj v. Hardeva 726

——1886—XXIV (CUDH RENT ACT), sections 67, 107C, *See* Will .. 486

——1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 25—*Jurisdiction—Suit instituted in Court of Munsif having Small Cause Court Jurisdiction—Munsif succeeded by another not having such jurisdiction—Suit tried by latter officer. Appeal.*] A suit for damages for cutting a branch of a tree was instituted in the Court of a Munsif having Small Cause Court powers. Before the suit was heard the Munsif went on leave and was succeeded by a Munsif who had not Small Cause Court powers, who accordingly tried the suit as a regular suit.

Held, that this procedure was correct and an appeal lay from the decree passed in it. *Sarju Prasad* v. *Mahadeo Pande*, I. L. R., 37 All., 350, referred to.

Zamir ul Hasan Khan v. Imdad Ali Khan 59

——1890—VIII (GUARDIANS AND WARDS ACT), SECTION 7—*Appointment of guardian to a minor—Discretion of Judge—Procedure—Judge not bound to observe the same formality of procedure as in an ordinary civil suit.*] In proceedings under the Guardians and Wards Act the District Judge exercises a parental jurisdiction and is not bound to observe that formality and precision of procedure which the Code of Civil Procedure exacts from a Court in the trial of a suit properly so called. The High Court will not upset an order appointing a guardian to a minor, if the order is in itself a reasonable one, merely because the Judge has to some extent failed to observe rules of procedure and evidence.

Khundi Devi v. Chotu Lal 587

——————————————, SECTIONS 39, 30, 47 AND 48—*Appeal.*] No appeal lies from an order passed under section 39 of the Guardians and Wards Act, 1890.

Lachmi Prasad v. Baldeo Dube 458

——1890—IX (INDIAN RAILWAYS ACT), SECTIONS 47, 54 AND 72—*Act No. IX of 1872 (Indian Contract Act), section 149—Liability of Railway Company for goods accepted by servant of the Company*

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for conveyance—Grant of receipt on behalf of the Company not essential to accrual of liability.] Where goods are tendered to the appropriate official of a Railway Company for despatch to a particular destination and are accepted by him, the liability of the Company in respect of such goods accrues from the time when the goods are so accepted, and is not dependent upon the granting or withholding of a receipt for the same on behalf of the Company by the official who has accepted the goods *Banna Mal* v. *The Secretary of State for India*, I. L. R., 23 All., 267, distinguished and doubted.

Sohan Pal, Munna Lal v. The East Indian Railway Company 218

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTION 77—*Suit against a railway—Notice of suit—Notice to be served on the Agent of the defendant railway.*] The notice required by section 77 of the Indian Railways Act, 1890, as a condition precedent to the institution of a suit for damages against a Railway Company must be served on the Agent, and cannot be replaced by a notice served on the Divisional or General Traffic Manager. *Great Indian Peninsula Railway Company* v. *Chandra Bai*, I. L. R., 18 All., 552, and *Great Indian Peninsula Railway Company* v. *Ganpat Rai*, I. L. R., 18 All., 544, referred to.

Ram Sahai, Chhidda Lal v. The East Indian Railway Company 545

—1894—I (LAND ACQUISITION ACT), SECTIONS 25, 26, 27 AND 54—*Reference to District Judge—Powers and duty of judge in dealing with an award made by the Collector—Review of his award by the Judge—Appeal.*] A District Judge on a reference made to him under the Land Acquisition Act, 1894, cannot award a less amount than that awarded by the Collector, even though the Collector has by mistake awarded to the claimant a larger sum than he is entitled to *Ezra* v. *Secretary of State for India*, I. L. R., 22 Calc., 995, referred to.

Where the District Judge, having confirmed the Collector's award, subsequently, on an application made by the Government Pleader, reviewed his award and made a fresh award reducing the amount awarded by the Collector. *Held*, that an appeal would lie against the revised award under section 54 of the Act.

Chandar Lal Sah v. The Collector of Bareilly 80

—1895—XV (CROWN GRANTS ACT), SECTION 3, *See* Act No. 1 of 1869, section 28 449

—1899—II (INDIAN STAMP ACT), SCHEDULE I, ARTICLE 33—*Stamp—Deed of gift—Value of property not stated.*] If in a deed of gift the value of the property dealt with is not set forth, the deed does not require any stamp, and it is not within the competence of the Collector to have the said property valued in order to assess the duty payable. If, however, the value of the property is intentionally omitted with a view to defraud the revenue, a prosecution will lie under section 64 of the Indian Stamp Act, 1899. *Reference under Stamp Act, section 46*, I. L. R., 8 Mad., 453, followed.

In the matter of Muhammad Muzaffar Ali 329

—1899—IX (INDIAN ARBITRATION ACT), SECTION 19—*Arbitration—Reference made by one party—Subsequent institution of suit by the other—No application for stay of suit, but award delivered by sole arbitrator—Application to file award.*] Under the terms of a contract which provided that all disputes arising thereunder should be referred to arbitration, one of the parties made a reference and sent notice to the other to appoint another arbitrator on their side The other party refused to join in the arbitration and filed a

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suit. The first party never applied for stay of the suit, but their arbitrator proceeded with the arbitration and delivered an award. *Held*, on application to make the award a rule of court, that the applicant not having asked for a stay of the suit, must be taken to have waived his right to arbitration and was not entitled to a decree on the award *Ram Prasad Suraj Mull* v. *Mohanlal Lachminarain*, I. L. R., 47 Calc., 752, and *Appavu Rowther* v. *Seeni Rowther*, I. L. R., 41 Mad., 115, referred to.

Chinman Lal, Posti Mal v. Phul Chand, Fateh Chand 232

ACTS—1899—IX (INDIAN ARBITRATION ACT), SCHEDULE I, CLAUSE (3)—*Arbitration—Award made after three months from notice calling on arbitrator to enter on reference, but within three months from the arbitrator entering upon the reference.*] *Held* on a construction of clause (3) of schedule I to the Indian Arbitration Act, 1899, that the provisions "entering on the reference" and "having been called upon to act by notice in writing" are alternative in the sense that where no reference is entered upon at all then the time runs from the notice calling upon the arbitrators to act. But, on the other hand, even though the arbitrators may be called upon to act by entering upon the reference, if they enter upon the reference, they have three months from that moment for making their award.

"Entering upon the reference" means not when the arbitrator accepts the office or takes upon himself the duty, but when he actually enters upon the matter of the reference, when the parties are before him, or under some peremptory order compelling him to conclude the hearing *ex parte*. *Baring-Gould* v. *Sharpington*, [1899] 2 Ch., 80, and *Baker* v *Stephens*, L. R., 2 Q. B., 523, referred to.

Sardar Mal, Hardat Rai v. Sheo Bakhsh Rai, Sri Narain 432

——1907—III (PROVINCIAL INSOLVENCY ACT), SECTION 16 (2)—*Insolvency—Vesting of property in receiver—Suit by receiver for declaration of title.*] All property such as may be acquired by or have devolved on the insolvent after passing of an order of adjudication and before his discharge, forthwith vests in the court or receiver and becomes divisible amongst the creditors in accordance with the provisions of sub-section (2), clause (a), of section 16 of the Provincial Insolvency Act. The receiver is entitled to sue for a declaration of title simply and need not claim actual possession.

Muhammad Fatima v. Muhammad Mashuq Ali .. 617

——————————, SECTION 22—*Insolvency—Claim to property advertised for sale by the receiver as property of an insolvent—Suit—Application under section 22.*] *Held* that a person claiming as his own property which has been advertised by the receiver as the property of an insolvent is not precluded from suing for a declaration of his title thereto by reason of his having made an application with the same object apparently under section 22 of the Provincial Insolvency Act, 1907, where as a matter of fact such application, though purporting to be made under section 22, was not made within the time prescribed. *Pita Ram* v. *Jujhar Singh*, I. L. R., 39 All., 626, distinguished.

Kundan Lal v. Khem Chand 620

——————————, SECTION 60 (2)—*Insolvent—Proceedings against insolvent arising out of execution of Revenue Court decrees.*] A judgment-debtor, against whom were outstanding decrees of a revenue court for rent, became insolvent. The decree-holder seeking to execute his decrees was met by an objection that the property against which execution was sought had

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been transferred by the insolvent judgment-debtor to his wife and minor son. The decree-holder, thereupon, with the leave of the Insolvency Court, brought a suit for a declaration that the transfers made by the insolvent were collusive and sham transactions, and that the properties should be declared to have vested in the receiver. *Held*, that, inasmuch as the Provincial Insolvency Act did not apply to proceedings in the Revenue Courts, the suit was misconceived and was not maintainable. *Kalka Das* v. *Gayju Singh*, I. L. R., 43 All., 510, followed.

Parbati v. Raja Sham Bikh 296

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 5—*Appeal filed after time owing to erroneous advice given by vakil—Extension of period of limitation.*] *Held* that an honest mistake on the part of a litigant caused by erroneous advice given to him by his vakil in the district, by reason of which an appeal was not filed until the period of limitation therefor had expired, is a good ground for the application in favour of the would be applicant of the provisions of section 5 of the Indian Limitation Act, 1908.

Wasi Ali Khan v *Zainab*, Weekly Notes, 1907, p. 32, *Ku. a Mal* v. *Ram Nath*, I. L. R., 28 All., 414, and *Anjora Kunwar* v. *Babu*, I. L. R., 29 All., 688, followed. *Coles* v. *Ravenshear*, [1907] 1. K. B., 1, and *In re Hei by*, [1894] 1 Q. B., 742, referred to.

Shib Dayal v. Jagannath Prasad 630

———, SECTION 19—*Acknowledgment of liability—Mukhtar-a-am—Authority of mukhtar-a-am to acknowledge liability on behalf of principal.*] It cannot be assumed that a mukhtar-a-am has power to acknowledge liability within the meaning of section 19 of the Indian Limitation Act; but such a liability can only be fastened upon the principal by a person duly authorized in this behalf, that is, who has been given authority to make such an acknowledgment of liability. *Beti Maharani* v. *The Collector of Etawah*, I. L. R., 17 All., 198, and *Gokul Singh* v. *Sahib Singh*, 15 A. L. J., 121, referred to

Naram Rao Kaha v. Mamu Kunwar 646

———, SCHEDULE I, ARTICLE 11A—*Limitation—Decree for possession—Resistance offered to decree-holder by third party—Suit for declaration that property is subject to decree.*] *Held* that article 11A of the first schedule to the Indian Limitation Act, 1908, applies to a suit brought by a decree-holder for a declaration that certain specific property, possession of which was refused by the occupant, was covered by his decree. *Sardhari Lal* v. *Ambika Pershad*, I. L. R., 15 Calc., 521, and *Ganpat Rai* v. *Husaini Begam*, 19 A. L. J., 68, referred to.

Bhiktari Das v. Abdullah 607

———, SCHEDULE I, ARTICLES 49 *and* 120—*Suit by a Muhammadan heir for share in inheritance—Limitation.*] *Held* that a suit by an heir of a Muhammadan to recover a share of the movable property left by the deceased is governed by article 120, and not by article 49, of the first schedule to the Indian Limitation Act, 1908. *Mahomed Riasat Ali* v. *Hasin Banu*, I. L. R., 21 Calc. 157, followed

Bashir-un-nissa Bibi v. Abdul Rahman 244

———, SCHEDULE I, ARTICLES 61 AND 132, *See* Act No. IV of 1882, sections 74 and 95 67

———, SCHEDULE I, ARTICLE 132, *See* Act No. I of 1872, section 124 860

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ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 139—*Landlord and tenant—Tenant holding over after expiration of lease—Suit for ejectment—Limitation.*] On the expiration of his lease a tenant for a term of years remained in possession of the demised premises but ceased to pay rent to the landlord. More than twelve years after the expiry of the lease the landlord brought a suit to eject his former tenant.

Held, that the suit was governed by article 139 of the first schedule to the Indian Limitation Act, 1908, and was barred by limitation. *Chandri* v. *Jaji Bahu*, I. L. R., 24 Bom., 504, followed. *Bilas Kunwar* v. *Desraj Ranjit Singh*, I. L. R., 37 All., 557, distinguished.

Bishesbar Nath v. Kundan 688

——— SCHEDULE I, ARTICLE 182 (5)—*Execution of decree—Limitation—Decree in part a mortgage decree and in part a simple money decree.*] In a suit against the members of a joint Hindu family based on a mortgage of the family property, it was found that a portion only of the mortgage debt was incurred for legal necessity. As to such portion as was supported by legal necessity the usual mortgage decree was passed against all the defendants. Simultaneously a simple money decree for the balance was passed against the two executants of the bond in suit. The decree-holder first executed the decree so far as it was a decree for sale, and then, within three years of this, though more than three years from the date of the decree, applied for execution of the simple money decree partly by arrest of one of the judgment-debtors.

Held, that the application was within time. *Dhirendra Nath Sarkar* v. *Nischintapore Company*, 36 Indian Cases, 1003, distinguished.

Ram Bichh Rai v. Deo Tiwari, I. L. R. .. 166

———, SCHEDULE I, ARTICLE 182(5)—*Execution of decree—Limitation—First application for arrest of judgment debtor—Second application for arrest of judgment-debtor and secondarily of his sureties.*] *Held* that an application for execution of a decree by arrest of the judgment-debtor will operate to save limitation in respect of a subsequent application in which the prayer was, first, for the arrest of the judgment-debtor, and secondly, for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor. *Muhammad Hafiz* v. *Muhammad Ibrahim*, I. L. R., 33 All., 152, referred to.

Badr-ud-din v. Muhammad Hafiz 743

———, SCHEDULE I, ARTICLE 183—*Civil Procedure Code* (1908), *section* 144—*Application for restitution—Limitation.*] *Held* that an application under section 144 of the Code of Civil Procedure to recover mesne profits which became payable to the applicant in consequence of a decree of the High Court having been reversed by the Privy Council, though not a proceeding in execution, yet, being an application to enforce a decree of His Majesty in Council, was governed as to limitation by article 183 of the first schedule to the Indian Limitation Act, 1908. *Madhusudan Das* v. *Brij Lal*, 61 Indian Cases, 800, referred to. *Jiwa Ram* v. *Nand Ram*, I. L. R., 44 All., 407, followed.

Brij Lal v. Damodar Das 855

——1908—XVI (INDIAN REGISTRATION ACT), SECTIONS 33 (a), 75—*Registration—Mortgage—Presentation—Authentication of power of attorney—Endorsement—Order of Registrar—Registration without fresh presentation.*] A sub-registrar to whom a mortgage was presented for registration under the Indian Registration Act, 1908,

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endorsed it with a statement that it had been presented on behalf of the mortgagee "under a power of attorney duly authenticated"; he, however, refused to register it on the ground that the execution had not been admitted as required by section 58. The Registrar having on appeal satisfied himself on that question made an order under section 75, sub section 1, that the document be registered. Upon the mortgage being forwarded to the sub-registrar with a copy of the order, he registered it.

Held, (1) that the endorsement was *prima facie* evidence that the power of attorney was regular in all respects, and, in the absence of evidence to the contrary, established the validity of the original presentation; (2) that the document having been duly presented before the registrar's order was made, the sub-registrar could validly register it under the order, without requiring a fresh presentation in the manner provided by section 32.

Under section 75, sub-section (2), a registering officer is bound to register a document if within 30 days of an order by the Registrar it is presented in the manner required for a presentation by section 32, but, on the hypothesis that the sub-section applies to the document which has already been duly presented, it does not preclude the registering officer from acting on the order without requiring a fresh presentation.

Jamku Prasad v. *Muhammad Aftab Ali Khan*, I. L. R., 37 All., 49, L. R., 42 I. A., 22, and *In re Shaik Abdul Aziz*, I. L. R., 11 Bom., 691, referred to.

Judgment of the High Court affirmed.

Chhotey Lal v. Collector of Moradabad 314

ACTS—1918—VII (INDIAN COMPANIES ACT), SECTION 39—*Company—Application for rectification of share register—Question of title—Discretionary power of court to refuse to decide such question—Appeal—Procedure regarding transfer of shares in Company.*] *Held* on a construction of section 39 of the Indian Companies Act, 1913, that the District Judge is not obliged to decide a question of title raised in a proceeding before him under the section; but if he do so decide such a question, or if he directs an issue to be tried, an order in case an appeal from the decision will lie in the manner provided by section 100 of the Code of Civil Procedure.

Observations on the powers and duties of a Company in connection with the transfer of its shares and correspondings thereto in the share register of the Company.

Union Indian Sugar Mill Company, Limited, v. Jai Deo .. 251

——1920—V (PROVINCIAL INSOLVENCY ACT), SECTIONS 4, 5 AND 75(2) —*Insolvency—Procedure—Appeal—Question of title—Act No. IV of 1882 (Transfer of Property Act), section 53.*] A court exercising insolvency jurisdiction under Act No. V of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act. But it also has to decide all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act, 1882.

Where a decision on a question of title whether certain property was still the property of the insolvent or had been the subject of a valid alienation was pronounced after the coming into operation of Act No. V of 1920, although the action of the receiver which gave rise to the question was taken before, it was *held* that an appeal lay under the new Act as a matter of right at the instance of a creditor adversely affected by the decision.

Shukr Prasad v. Aziz Ali 71

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ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTIONS 5, 75 (3)—*Appeal—Review of judgment—Appeal from order granting review—Civil Procedure Code* (1908), *order XLVII, rule* 7.] A District Judge sitting as an appellate court in insolvency has the same powers as an appellate court under the Code of Civil Procedure *Inter alia* he is competent to review his judgment in appeal, and if he does so, an appeal from that order will only lie if the provisions of order XLVII, rule 7, of the Code of Civil Procedure are applicable. *Shibri Prasad v. Aziz Ali*, I. L. R., 44 All., 71, referred to

Munnu Lal v. Kunj Bihari Lal 605

——————————, SECTION 28 (2)—*Joint Hindu family—Insolvency of father—Vesting of entire family property in the receiver.*] Where the father of a joint Hindu family which includes minor sons as well as himself seeks the protection of the Bankruptcy Court, he must place all his property at the disposal of the court and of the receiver appointed by the court. From the date of the adjudication the receiver takes over all rights in the insolvent's property which the insolvent himself possessed, and one of those rights would be to alienate co-parcenary property belonging to himself and his minor sons in satisfaction of antecedent debts incurred by him, provided those debts were not tainted with immorality. *Falichand Motichand v. Motichand Hurrukhchand*, I. L. R., 7 Bom., 433, and *Rangayya Chetti v. Thanikachalla Mudali*, I. L. R., 19 Mad. 74, referred to.

Bawan Das v. O. M. Chiene 316

——XXVI (CIVIL PROCEDURE CODE AMENDMENT), SECTION 3(1), *See* Civil Procedure Code (1908), order XLV, rule 7 216

——————————, SECTION 3(1) *—Civil Procedure Code* (1908), *order XLV, rule 7—Appeal to His Majesty in Council—Deposit of security—Limitation.*] *Held* that the provisions of Act No. XXVI of 1920 do not apply to an appeal from a decree passed before the coming into force of that Act.

Delhi Rai v. Prahlad Das 242

——(LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 20—*Act No. IX of* 1872 *(Indian Contract Act), section* 24—*Occupancy holding—Mortgage—Suit on personal covenant to pay.*] The mortgage of an occupancy holding being void in its entirety, it is not open to the mortgagee to sue for a money decree on the basis of a personal covenant to pay contained in such a mortgage. *Kanhai v. Tilak*, 16 Indian Cases, 42, *Murlidhar v. Pem Raj*, I. L. R., 22 All., 205, and *Bhawani Prasad v. Ghulam Muhammad*, I. L. R., 18 All., 121, referred to.

Har Prasad Tiwari v. Sheo Govind Tiwari 486

——————————, SECTION 22—*Act No. XII of* 1881 *(N.-W. P. Rent Act), section* 9—*Occupancy tenant—Inheritance—Succession to tenant dying before* 1902.] One Ram Kirpal, the holder of an occupancy tenancy, died prior to the coming into force of the Agra Tenancy Act, 1901, and was succeeded in the tenancy by his widow. After the death of the widow (the Act of 1901 being then in force) the reversioners of Ram Kirpal sued to eject her representative on the ground that they were the persons entitled to possession on the widow's death.

Held that the claim was governed by the law as laid down in the North-Western Provinces Rent Act, 1881, and the plaintiffs were not entitled to succeed unless they could prove that they had shared with Ram Kirpal in the cultivation of the tenancy.

Bechu Singh v. Baldeo Singh 327

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ACTS (Local)—1901—II (Agra Tenancy Act), section 23—*Occupancy rights created under Act No X of 1859—Tenant succeeded by widow in 1868—Widow's death after passing of Act No. II of 1901—Succession*] The holder of an occupancy tenancy died about the year 1868. After his death, his widow took possession of the holding and remained in possession until 1893, when she made a gift of it. The widow died in 1915, and the reversioners then sued the donees to recover possession.

Held that the widow did not succeed to a heritable estate, but acquired by virtue of possession an estate in herself. Succession to this estate was governed by the present Agra Tenancy Act of 1901, and the plaintiffs, not being sharers in the cultivation at the date of the death of the widow, were not entitled to succeed

Manpal Singh *v.* Raja Partab Singh 376

——————, sections 95 and 167—*Civil and Revenue Courts—Jurisdiction—Substance of the dispute between the parties to be regarded and not the mere words of the pleadings*] On the death of one *L*, an occupancy tenant, an application for mutation of names was made by certain persons who alleged that they were his grandsons, being the sons of *G* who had been adopted by *L*, but had died in his lifetime. Whilst these mutation proceedings were pending, the zamindars filed a suit in a Civil Court. They denied the factum and the legality of the adoption of *G* and, though admitting that the applicants for mutation were tenants of some kind, alleged that they were merely non-occupancy tenants from year to year. The only relief sought was "that it may be declared that Govind was not the adopted son of Lalji and that the defendants are not the grandsons of Lalji."

Held that the real dispute between the parties was, the relationship of landlord and tenant being admitted to subsist between them, merely as to the nature of the tenancy. The matter in issue was one which could be the subject of a suit under section 95 of the Agra Tenancy Act, 1901, and was therefore cognizable by a Court of Revenue and not by a Civil Court, and an appeal lay to a Court of Revenue and not to the District Judge or the High Court.

Ram Charitra Rai v. *Jiwan Ahwin*, I. L. R., 36 All., 48, *Dori Lal* v *Sardar Singh*, 5 A. L. J., 514, and *Birbans Kuhal* v. *Sumera*, I. L. R., 35 All., 299, referred to.

Jagannath *v.* Balwant Singh 692

——————, section 158—*Rent-free grant in favour of an idol—"Two successors to the original grantee"—Whether successive priests in office can be deemed such successors.*] Where property is given rent-free to an idol at a particular shrine, as distinguished from the priest of the shrine, it is not open to the priest for the time being, after the lapse of a certain time, to claim the benefit of section 158 of the Agra Tenancy Act upon the ground that the property had been held by two or more successors to the original grantee. *Bharat Das* v. *Nandram Kunwar*, I. L. R., 38 All., 689, referred to.

Mathura Prasad *v.* Rameshwar 160

——————, section 177—*Suit for ejectment—Decree for ejectment reversed on appeal—Application to Court of Revenue for restitution—Application dismissed—Appeal—Civil Procedure Code* (1908), *section* 144] An application for restitution of possession under section 144 of the Code of Civil Procedure in consequence of the decree against them having been reversed on appeal was made by the defendants in an ejectment suit

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to the court of first instance, being a Court of Revenue. That court, however, rejected the application.

Held that the order of the Court of Revenue was not a "decree" and no appeal lay therefrom to a Civil Court. *Zohra* v. *Mangu Lal*, I. L. R., 28 All., 753, referred to.

Kashi Prasad Singh v. Bulbhaddar Singh 283

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 201—*Evidence—Presumption—Suit for profits—Alteration in revenue records as to extent of plaintiff's share during the period covered by the suit.*] Where, in a suit for profits, it is found that there has been an alteration in the revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the court must be to consider the order by which the alteration was made and to give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of an eight anna share in a mahal during the first year of the period in respect of which profits were claimed, and it were shown that after the close of that year he had been recorded as proprietor of a four anna share only, upon a finding that he had transferred his interest in the remaining four anna share after the close of the first year in suit, then the duty of the court would be to give effect to the entries year by year, calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When, however, it is clear, upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and was not passed upon any alleged transfer having occurred during the years covered by the suit, then the Revenue Court is bound to give effect to the entry as it stood on the date of the institution of the suit.

Durga Prasad v. *Basari Singh*, I. L. R., 29 All., 799, *Lachman Prasad* v. *Shitabo Kunwar*, I. L. R., 30 All., 177, and *Mubarak Fatima* v. *Muhammad Qali Khan*, I. L. R., 43 All., 607, referred to.

Mubarak Fatima v. Muhammad Qali Khan .. 413

———————————, SECTION 201 (3)—*Suit for profits—Plaintiff recorded co-sharer at date of suit—Effect of decision of Civil Court against plaintiff's title* post litem motam.] Where the decision of a suit in a Court of Revenue depend upon the determination of a question of title, the Court of Revenue is bound to follow the decision of a competent Civil Court on such question, even though that decision may have been come to while the suit in the Court of Revenue is in the stage of appeal. *Bhawani Singh* v. *Dilawar Khan*, I. L. R., 3 All., 253, followed.

Surjan Singh v. Chatrea Kunwar 250

———————————, SECTION 201 (3)—*Suit for profits—Presumption—Joint Hindu family.*] The presumption of law provided for by section 201 (3) of the Agra Tenancy Act, 1901, is none the less applicable because the parties to a suit for profits may be members of a joint Hindu family.

Shee Narain v. Bala Rao 616

———————————, SECTION 202, *See* jurisdiction 743

———————————III (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 111 AND 238 (*h*)—*Partition—Question of title raised by suit in Civil Court pending partition in Revenue Court.*] No suit will lie in a Civil Court at the instance of a party to partition proceedings pending in a Court of Revenue for the decision of a

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question of title concerning the property to which such proceedings relate, such question not having been raised in the partition proceedings. *Ganesh Tewari* v. *Salik Pande*, 12 A. L. J., 949, followed.

Ram Subhag Singh v. Dip Narain Singh 74

ACTS (LOCAL)—1912—IV (COURT OF WARDS ACT), SECTIONS 37 AND 45—*Property of disqualified proprietor retained after death of owner—Position of successor as to debts incurred by him.*] Where, on the death of a ward the possession of the ward's property is still retained by the Court of Wards, the ward's successor is not disqualified from incurring any liability which might affect the property after the debts and liabilities due by the Court of Wards have been discharged.

Dalip Singh v. Khurshed Husain 706

———, SECTION 55—*Disqualified proprietor—Suit by disqualified proprietor as manager of an idol.*] Section 55 of the Court of Wards Act, 1912, has no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee. A person who happens to be the manager of an endowed property cannot be regarded as a disqualified proprietor in respect of the property which he so holds as manager, and the idol, in whom the endowed property is supposed to be vested, cannot be treated as a ward within the meaning of section 55 of the Act.

Sri Thakurji v. Hira Lal 631

ANCESTRAL PROPERTY, *See* Execution of decree 380

ANNUITY, *See* Civil Procedure Code (1908), order II, rule 2 .. 603

ANTECEDENT DEBT, *See* Hindu law 190, 368, 382

APPEAL, *See* Act No XIX of 1841, section 18 546

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———, *See* Act No. VII of 1870, section 7, sub-section (iv) (*f*) .. 542

———, *See* Act No. VII of 1870, section 7, sub-section (v), (*a*), (*b*) .. 620

———, *See* Act No IX of 1887, section 35 52

———, *See* Act No. VIII of 1890, sections 20, 30, 47 and 48 .. 458

———, *See* Act No. I of 1894, sections 25, 26, 27 and 54 86

———, *See* Act No. IX of 1908, section 5 536

———, *See* Act No. VII of 1913, section 38 151

———, *See* Act No. V of 1920, sections 4, 5 and 75(2) 71

———, *See* Act No. V of 1920, sections 5, 75(3) 565

———, *See* Act (Local) No. II of 1901, section 177 383

———, *See* Civil Procedure Code (1908), sections 104, 107 and 151; order XLI, rule 23, and order XLIII 491

———, *See* Civil Procedure Code (1908), section 105 534

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———, *See* Court fee 577

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APPEAL to His Majesty in Council, *See* Civil Procedure Code (1908), section 110 200

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——————. Abatement of——, *See* Civil Procedure Code (1908) order XXII, rule 9 (2) 459

APPLICATION for leave to sue *in formâ pauperis*, *See* Civil Procedure Code (1908), section 115 248

ARBITRATION—*Construction of document—Contract—Acceptance subject to condition subsequent—Form of indent used by the Delhi Piece Goods Association.*] *Held* on a construction of a clause contained in a letter of acceptance to the effect that "the acceptance is subject to revision and confirmation by mail if required," in connection with a form of indent for goods to be imported from England, devised by the Delhi Piece Goods Association and in common use in Northern India, which contained the stipulation—"It is distinctly understood between the sellers and the buyers in India that offers, if accepted by telegram, are subject to revision and confirmation by mail only if any mistake has been made in the telegram"—that the clause did not stand in the way of there being a complete and binding contract between the buyer and the seller, but merely meant that the contract was subject to the possible discovery that an event had occurred which was not within the control of either party, namely, an error on the part of the telegraph department.

Held also that another clause of the same indent form to the effect that in the event of the purchaser failing to take up the seller's invoice as a draft to be accepted on presentation and paid at maturity, the importers are authorised to sell the goods by public auction after due notice and to claim for the difference between the selling price and the contract price, did not amount to a condition precedent and bar the seller of his right to claim a reference to arbitration as provided by a different clause unless and until the goods had been sold by public auction.

Sushil Chandra Das and Co. *v.* Sukhamal, Bansidhar .. 472

——————*Contract making it obligatory on parties to prefer claims within a stated time—Claim not made within time—Award made in despite of condition not upheld.*] The terms of a contract of sale provided that disputes between the parties should be settled by arbitration. But they also provided that "no claim or dispute of any sort whatever can be recognized if not made in writing within 60 days from due date of payment." The buyers refused to take delivery and the sellers claimed damages, but did not put in their claim in writing within 60 days. The matter went to arbitration and the umpire, notwithstanding the clause cited above, decided that the claim was not barred, and made an award in favour of the sellers.

Held, on an application to file the award, that the award of the umpire was not the decision of a tribunal to which the buyers' firm was bound, under the terms of their contract, to submit.

Kedar Nath, Moti Lal *v.* Sukhamal, Bansidhar .. 481

——————, *See* Act No. IX of 1899, section 19 382

——————, *See* Act No. IX of 1899, schedule I, clause (3) .. 482

——————, *See* Civil Procedure Code (1908), schedule II, paragraph 1 91

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ATTACHMENT, *See* Civil Procedure Code (1908), order XXI, rule 57 .. 274

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AUCTION PURCHASER, *See* Mortgage 488

AWARD, *See* Act No. IX of 1899, schedule I, clause (3) 432

———, *See* Arbitration 472, 481

BENAMIDAR, *See* Act No. XXVI of 1881, section 71 290

BOND Cancellation of—, *See* Criminal Procedure Code, section 125 .. 614

BURDEN OF PROOF, *See* Act No. I of 1872, section 112 470

———————, *See* Act No. XXIII, section 7 697

———————, *See* Hindu Law 756

———————, *See* Suit for malicious prosecution 486

CAUSE OF ACTION, *See* Civil Procedure Code (1908), order II, rule 2(1) 121

———————, *See* Suit against Secretary of State 573

CHARGE, *See* Act No. IV of 1882, sections 74 and 95 67

———, *See* Criminal Procedure Code, sections 234 and 235 .. 540

CIVIL AND REVENUE COURTS—*Jurisdiction—Procedure—Revenue Court finding that plaint does not disclose a cause of action triable by such court.*] Where a Court of Revenue finds that on the facts stated in a plaint presented to it no case is disclosed triable by such a court, it should not merely dismiss the suit, but should order the plaint to be returned to the plaintiff for presentation in proper court.

Ram Jas Singh v Babu Nandan Singh 686

———————, *See* Act (Local) No. II of 1901, sections 95 and 167 692

———————, *See* Jurisdiction 724, 748

CIVIL PROCEDURE CODE (1908), SECTION 2, CLAUSE (12)—*Mesne profits—Decree granting mesne profits silent as to interest .. Interest realizable in execution proceedings.*] Where a decree for mesne profits is silent as to interest thereon, the decree-holder is entitled to realise in execution interest at the usual rate of 6 per cent.

Girish Chunder Lahiri v. *Shoshi Shikha sswar Roy*, I. L. R., 27 Calc., 951, and *Nawat Singh* v *Har Gajan*, I. L. R., 25 All., 270, followed. *Abdul Ghafur* v *Raja Ram*, I. L. R., 23 All., 262, overruled.

Lalta Prasad v Sri Ganesh 570

———————, SECTION 11—*Res judicata—First Court not competent to try second suit.*] In order that the doctrine of *res judicata* may apply it is necessary that the trial court which passed the earlier decision should have been competent to try the suit subsequently brought. *Rajah Run Bahadoor Singh* v *Mussumut Lachoo Koer*, L. R., 12 I. A. 2-4, and *Mir Rughobar Dial* v. *Rajah Sheo Baksh Singh*, I. L. R., 9 I. A., 197, followed

Kannu v. Musammat Fahiman 712

———————, SECTION 11; ORDER XXXIV, RULE 10—*Decree for sale on mortgage—Costs not included in final decree—Execution court not competent to rectify decree—Doctrine of res judicata as applied to execution proceedings.*] Where, by some oversight, the costs of the lower appellate court and the costs of the High Court, which should have been entered in a final mortgage decree, were not so entered, it was held that it was not competent to the execution court to rectify the omission. The only costs which an execution court can add to a decree are costs of execution.

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Held also that the judgment-debtor could not raise in second appeal the defence that the decree was not capable of execution as being in effect the decree of the court of the first instance and not the decree of the High Court, which alone could be executed, when he had not raised such defence in the court of the first instance. *Ram Kirpal* v. *Rup Kuari*, I. L. R., 6 All. 269, referred to.

Dambar Singh v. Kahan Singh 85

CIVIL PROCEDURE CODE (1908), SECTION 11, EXPLANATION IV; ORDER XXI, RULE 52(2)—*Execution of decree*—Res judicata—*How far principle* of res judicata *applicable to proceedings in execution*] A suit for the recovery of money due on two hundis ended in a compromise decree whereby the defendant Mangli Prasad, as representing a firm called Bhairon Prasad Mahadeo, agreed to pay the decretal amount by instalments. Four houses and some zamindari property were hypothecated as security for payment of the instalments as they came due, it was provided that on default being made the decretal amount could be realized from the mortgaged property and from the persons and other property of Mangli Prasad, Phul Chand and Suraj Karan, members of the firm of Bhairon Prasad Mahadeo. The decree not having been satisfied, the decree-holder applied for execution, and had the property charged in the decree attached. Whereupon Phul Chand, for himself and his minor brother Suraj Karan, applied for and obtained exemption of the attached property to the extent of two-thirds, upon the grounds that they were not parties to the decree, that they were not disclosed in the plaint as partners, and that the property was not proved to have been the property of the firm. An application for review of this order was dismissed.

The decree-holder then applied under order XXI, rule 50, clause (2), of the Code of Civil Procedure asking for leave to execute the decree against Phul Chand and Suraj Karan as members of the firm, and on this application it was held that they were members of the firm Bhairon Prasad Mahadeo and liable equally with Mangli Prasad to pay the decretal debt. The two brothers appealed.

Held by WALLACH, J., that the application was rightly entertained and was not barred by the principle of *res judicata* or by section 11 of the Code of Civil Procedure. Although the question raised thereby—of the connection of the opposite parties with the firm of Bhairon Prasad Mahadeo—might no doubt have been raised in the former proceedings, it was not so raised, and the explanations to section 11 of the Code of Civil Procedure could not be applied to proceedings in execution. *Kaliyan Singh* v. *Jagan Prasad*, I. L. R., 37 All., 589, referred to.

Held by WALSH, J., *contra*. The decision of the court on the application of Phul Chand and Suraj Karan for exemption was conclusive as against the decree-holder and he should not have been permitted to go behind it. *Ram Kirpal* v. *Rup Kuari*, I. L. R., 6 All., 269, and *Kishan Sahai* v. *Alladad Khan*, I. L. R., 14 All., 64, referred to. *Kaliyan Singh* v. *Jagan Prasad*, I. L. R., 37 All., 589, distinguished.

Phul Chand v. Kanhaiya Lal 180

———— .. .. , SECTION 11—Res judicata—*Application of the doctrine of res judicata to persons who were co-defendants in the former suit.*] A decision as between co-defendants cannot be *res judicata* under the provisions of sections 11 of the Code of Civil Procedure unless it was necessary to decide an issue between them in order to grant relief to the plaintiff.

Muhammad Ahmad v. Zahur Ahmad 334

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CIVIL PROCEDURE CODE (1908), SECTION 11, EXPLANATION VI, *See* Res judicata 19

———— , SECTION 24, ORDER XII, RULE 23—*Remand—Transfer of case remanded by High Court—Jurisdiction.*] *Held* that an order of the High Court remanding a case to a District Judge for disposal on the merits will not have the effect of limiting the powers of the District Judge under section 24 of the Code of Civil Procedure unless the Court's order is drawn up in express terms so as to disclose a clear intention of limiting those powers. *Sita Ram v. Nauni Duleiya*, I. L. R., 21 All., 220, not followed. *Pandoji v. Sito Bharosi*, 12 A. L. J., 1904, referred to.

Rajkali v Gopi Nath Nath 211

———— , SECTION 24—*Transfer—Principles guiding a court in considering an application for the transfer of civil cases.*] In the matter of applications for the transfer of suits it is the duty of a court to insist upon any litigant applying for transfer making out a strong case in favour of the balance of convenience. On the question of the balance of convenience, the convenience of the parties in the conduct of the litigation is certainly a relevant consideration. *Tula Ram v. Hargovan Das*, 14 A. L. J., 243, and *Subba Bibi v. Mahbub Husain*, I. L. R., 5 All., 60, followed. *Madho Prasad v. Moti Chand*, 17 A. L. J., 371, doubted.

Inayat-ullah Khan v Nasir Ahmad Khan .. 278

———— , SECTION 48, CLAUSE 2 (*a*)—*Execution of decree—Limitation—"Fraud"—Execution prevented by a series of frivolous objections on the part of the judgment-debtor.*] Where the judgment-debtors by means of a series of absolutely frivolous and futile objections succeeded in preventing execution of the decree against them for more than twelve years, it was *held* that their conduct amounted to fraud within the meaning of section 48 clause 2(*a*), of the Code of Civil Procedure and the decree-holder was entitled to the benefit of the section. *Ram Prasad v. Kashi Nath*, 6 A. L. J., 401, *Mewa Lal v. Ahmad Ali*, 9 A. L. J., 17 *Kearsley v. Edmonds*, 13 C. B., 777, *Jolliffe v. Baker*, 11 Q. B. D., 255, and *Barry v. Fuch*, 14 A. C., 337, referred to.

Lalta Prasad v. Suraj Kumar 319

———— , SECTION 54, ORDER XXI, RULE 1(*c*), *See* Execution of decree 714

———— , SECTION 92—*Suit relating to a trust created for public purposes of a charitable or religious nature—Provisions of section 92 compulsory, where applicable—Act No. I of 1877 (Specific Relief Act), section 42—Suit for a declaration merely.*] Where circumstances are alleged to exist in which a suit relating to an express or implied trust created for public purposes of a charitable or religious nature, may be instituted under the provisions of section 92 of the Code of Civil Procedure, the suit must be instituted in accordance with those provisions. It is not open to the would-be plaintiffs to evade the requirements of the Code by framing their suit as one under section 42 of the Specific Relief Act, 1877.

Mufti Ali Jafar v Fazil Husain Khan 621

———— , SECTION 92—*Suit relating to a trust created for a public purpose of a charitable or religious nature—Suit against a trustee de son tort.*] *Held* that a suit of the nature mentioned in section 92 of the Code of Civil Procedure, 1908, will lie against a person who, without title, chooses to take upon

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self the character of a trustee, or, in other words, a trustee *de son tort*. *Badri Das Mukim* v. *Ohooni Lal Johurry*, I. L. R., 33 Calc, 789, referred to.

Ram Bilas v. Nityanand 652

CIVIL PROCEDURE CODE (1908) SECTION 92—*Suit between rival claimants to the office of trustee—Trustee nominated in trust-deed—Subsequent deed nominating different person*] Section 92 of the Code of Civil Procedure does not apply to a suit between persons who individually claim a right to succeed to the office of trustee.

Where the founder of a trust had, by the trust-deed, appointed himself a trustee for life and nominated the plaintiff as his successor in that office, but by a subsequent document he appointed the defendants as trustees after him, it was *held* that as he had reserved no power to himself by the earlier deed to alter the scheme of management there laid down, the subsequent appointment of the defendants was not valid *Budree Das Mukim* v. *Ohooni Lal Johurry*, I. L. R., 33 Calc, 789, *Muhammad Abdul Majid Khan* v *Ahmad Said Khan*, I. L. R., 35 All, 459, and *Sudhan Lal* v. *Gauri Shankar*, 40 Indian Cases, 165, referred to.

Puttu Lal v. Daya Nand 721

——————, SECTIONS 104, 107, 151; ORDER XLI, RULE 23, AND ORDER XLIII—*Order of remand not showing under what provision it was made—Appeal.*] When a court makes an order of remand but without specifying under which provision of the Code of Civil Procedure the order is passed, it may be assumed that the order is one under order XLI, rule 23, of the Code, and an appeal will lie therefrom *Gokul Prasad, Har Prasad* v. *Ram Kumar*, I. L. R., 44 All, 176, referred to.

Kulsum-un-nissa v. Ram Prasad .. 493

——————, SECTION 105—*Interlocutory order—Appeal.*] Where there is some unappealable interlocutory order, its irregularity or any defect in it may, so far as they affect the decision of the case, be raised when the decree in the suit in which it was passed is appealed from, and this power is not affected by the fact of an appeal having been erroneously filed against the order itself and dismissed. *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh*, I. L. R., 47 Calc., 924, referred to

Shankar Lal v. Muhammad Amin .. 534

——————, SECTIONS 107, 151; ORDER XLI, RULE 23—*Remand—Inherent powers of court to order remand—Appeal from remand made under inherent powers—Scope of order XLI, rule 23.*] In a suit for rendition of accounts of certain partnership transaction, the court appointed a commissioner to examine the accounts and on the basis of his report passed a preliminary decree. The plaintiff appealed to the Court of the District Judge, who remanded the case to the first court for re-trial, but without definitely stating under what provision of the Code of Civil Procedure he did so On appeal from this order it was contended that no appeal lay, the order of remand having been passed, not under order XLI, rule 23, but under the inherent powers of the court apart from order XLI.

Held that it was not necessary to decide whether such inherent powers of remand as may have been exercised by High Courts from time to time were or were not possessed by District Judges; but, inasmuch as the policy of the Court had always been to allow as wide a meaning as was reasonably possible to the provisions of order XLI, rule 23, the remand might be taken to have been made under that order.

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Observations as to the inherent powers of remand possessed by High Courts. *Ghuznavi* v. *The Allahabad Bank, Ld.*, I. L. R., 44 Calc., 229, and *Habib Bakhsh* v. *Bildeo Prasad*, I. L. R., 23 All., 167, referred to.

Gokul Prasad, Har Prasad v. Ram Kumar .. 176

CIVIL PROCEDURE CODE (1903), SECTION 110—*Appeal to His Majesty in Council—"Affirms the decision," meaning of—Decree of lower court modified only in favour of the would-be appellant but in other respects affirmed.*] *Held* that an appeal to His Majesty in Council would not lie against a decree which, in so far as it modified the decree of the court below, was in favour of the would-be appellant, but in so far as it was against the would-be appellant agreed with the decree of the court below. *Bhagwan Singh* v. *The Allahabad Bank Ld.*, 19 A. L. J., 3, distinguished.

Kamal Nath v. Bithal Das 200

——————, SECTION 113—*Application for leave to sue in formâ pauperis—Order rejecting such application—Revision.*] *Held* by Walsh, J., that no application in revision under section 115 of the Code of Civil Procedure will lie from an order rejecting an application for leave to sue *in formâ pauperis*. *Buddhu Lal* v. *Mewa Ram*, I. L. R., 43 All., 561, followed.

Mahadeo Sahai v. The Secretary of State for India in Council 248

——————, SECTIONS 141 AND 144—*Proceedings for restitution of benefit derived from a decree reversed on appeal—Application dismissed for default but subsequently restored—Execution of decree.*] Held that, proceedings under section 141 of the Code of Civil Procedure not being proceedings in execution, the provisions of section 141 of the Code apply to them.

Somasundaram Pillai v. *Chokkalingam Pillai*, I. L. R., 40 Mad., 780, dissented from.

Jiwa Ram v Nand Ram 407

——————, SECTION 144 (2)—*Suit for damages by a defendant to prior suit—Injury to property by reason of prior suit—Costs no adequate compensation.*] A dispute between the widow of a deceased Hindu and a person who alleged that he was the adopted son of the deceased was referred to arbitration. The arbitrator decided, *inter alia*, that half of the debts owed to the deceased should be assigned to the widow and half to the alleged adopted son. The latter took proceedings to set aside the award, in which he was successful in the first court, but on appeal the High Court restored the award. Meanwhile during the period in which the award, owing to the action taken by the alleged adopted son, remained in abeyance, several of the debts became time-barred. The widow then sued to recover special damages on this account.

Held that the damages incurred were of a special nature and could not be compensated by an order for costs alone. The suit was properly brought and was not barred by section 144 of the Code of Civil Procedure *Quartz Hold Consolidated Gold Mining Co.* v. *Eyre*, L. R., 11 Q. B. D., 674, referred to. *Mohini Mohan Misser* v. *Surendra Narayan Singh*, I. L. R., 42 Calc., 560, not followed.

Arjun Singh v. Musammat Parbati 687

——————, SECTION 144, *See* Act (Local) No. II of 1901, section 177 283

——————, SECTION 144, *See* Act No. IX of 1908, schedule I, article 183 555

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CIVIL PROCEDURE CODE (1908), SECTION 145—*Liability of surety for production of judgment debtor—Failure to produce judgment-debtor due to his having been sentenced to imprisonment in a criminal case—Knowledge of surety that criminal case was pending.*] In order to procure the release of *L*, who had been arrested in execution of a decree, one *R* gave a bond to the Court for the production of *L*, when called upon, and in case of default, for payment of the amount of the decree under which *L* had been arrested. At the time when *R* executed the bond, criminal proceedings were, to *R's* knowledge, pending against *L*, and by the time that *R* was called upon to produce *L* in court, it was impossible to do so because *L* had been sent to jail. *Held* that in the circumstances the surety could not be excused for his inability to produce the judgment-debtor, inasmuch as the possibilty or even the probability of his being sent to jail must have been within the surety's contemplation. *Krishnan Nayar* v *Ittinan Nayar*, I. L. R., 24 Mad., 657, *Ashig Ali* v. *Moti Lal*, 4 A. L. J., 447, and *Nabin Chandra Hazra* v. *Mirtunjoy Barick*, I. L. R., 41 Calc., 50, distinguished

Rameshwar Das *v.* Sri Lal 17

——————, ORDER I, RULE 8—*Suit in representative capacity—Suit not invalidated by omission to publish notice.*] Order I, rule 8, of the Code of Civil Procedure (1908) requires that when a plaintiff brings a suit in a representative capacity he must first obtain the leave of the court to bring such a suit, and when the leave is granted, the court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are peremptory and the court is bound to issue notice as required by the rule. If, however, the court omits to issue notice, the result is not necessarily that the entire suit is vitiated and must be dismissed. The irregularity may be cured in appeal by the appellate court remanding the case to the court of first instance in order that the omission may be repaired. *Mulk Lal Singh* v *Jagdeo Tewari*, I. L. R., 35 Calc., 1021, referred to. *Dhanpat Singh* v. *Pa ash Nath Singh*, I. L. R., 21 Calc., 180, referred to by PRATT, J.

Shiam Lal *v.* Musammat Lalli 231

——————, ORDER II, RULE 2 (1)—*Cause of action—Suit to include whole claim—Mortgage—Suit to recover principal after suit for interest.*] By order II, rule 2 (1), of the Code of Civil Procedure, 1908, "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action;" . . . A simple mortgage executed in 1910 provided by clause 2 that the interest should be paid monthly; and that if it was not paid for six months the mortgagee could realize either the unpaid interest only, or both the principal and interest, by bringing a suit, without waiting for the expiration of the time provided for repayment of the principal; by clause 7, if the principal and interest were not paid within three years, the mortgagee could sue for principal and interest, together with incidental expenses. In 1914 the mortgagee sued in respect of the interest due and obtained a decree. In 1915 he brought a second suit in respect of the principal and the interest then due.

Held that the second suit could not be maintained having regard to order II, rule 2 (1).

Judgment of the High Court affirmed.

Muhammad Hafiz *v.* Muhammad Zakariya 131

——————, ORDER II, RULE 2—*Annuity—Suit for arrears—Suit dismissed as premature and appeal subsequently withdrawn—Later suit for subsequent instalment decreed—Another suit thereafter for original arrears.*] An annuitant sued for

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arrears of his annuity from 1914 to 1917. On the date fixed for hearing the parties were absent, and the suit was dismissed; but it was dismissed rather because the court found it to be premature than on account of the absence of the parties. The plaintiff applied to have the order of dismissal set aside, but his application was rejected. He appealed against this order of rejection, but subsequently withdrew the appeal. Meanwhile the plaintiff sued for a further instalment of the annuity, which had fallen due on the 1st of July, 1917, and obtained a decree. He then (after the appeal above-mentioned had been withdrawn) sued again to recover the arrears of the annuity which had formed the subject of his original suit.

Held that the suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure, 1908.

Abdul Karim *v.* Muhammad Jan 663

CIVIL PROCEDURE CODE (1908), ORDER XI, RULES 14, 18 AND 21—*Order on defendant for production of document—Order not complied with—Defence struck out.*] Non-compliance with an order served on a defendant for the production only of documents under rule 14 of order XI of the Code of Civil Procedure does not warrant the striking out of the defence. It is only in case of the refusal to answer interrogatories, the refusal to make discovery of documents, or the refusal to permit inspection of documents that a trial court is justified in striking out the defence of a defendant or in dismissing the suit of a plaintiff.

Lyallpur Sugar Mills Co., Ltd. *v.* Ram Chandra Gir Sahai Cotton Mills Co., Ltd 565

———, ORDER XXI, RULE 2 (2)—*Act No. I of 1872 (Indian Evidence Act), section 92—Execution of decree—Adjustment of decree out of court—Oral executory contract set up by the judgment-debtor as a bar to execution.*] The holder of a decree payable by instalments applied for execution of the decree by arrest of the judgment-debtor, alleging that nothing had been paid towards satisfaction of the decree. The judgment-debtor thereupon filed a petition alleging that the question of the execution of the decree had been settled out of court by means of an agreement between the parties, under which the judgment-debtor was to make a present payment to the decree-holder and further to convey to him certain items of immovable property. The decree-holder denied that any such adjustment as alleged had taken place, and the judgment-debtor was unable to show that any part of the alleged agreement which, according to his own account of it, was to be performed by him, had been so performed.

Held that such an agreement as alleged could not be set up by the judgment-debtor under rule 2 of order XXI of the Code of Civil Procedure as a bar to execution.

Held further, by Walsh, J., that section 92 of the Indian Evidence Act, 1872, was also a bar to the setting up of such an oral agreement substituting a new executory contract in place of the original decree.

Lachhman Das *v.* Baba Ram Nath Kalkumlawala .. 358

———, ORDER XXI, RULE 35—*Co-sharers jointly in possession—One co-sharer ousted by another—Suit for possession and profits by way of damages—Decree given for joint possession but not for profits.*] The plaintiff and the predecessor in title of the defendants were joint owners of certain immovable and at one time were in joint cultivatory possession. They then leased the land to a tenant. Subsequently the tenant surrendered the land to the predecessor in title of the defendants, who then proceeded to exclude the plaintiff.

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Held that the plaintiff was entitled in the circumstances to a decree for joint possession, though not to a decree for profits by way of damages. Such profits could be taken into account when the annual accounts of the village income were adjusted. *Watson & Co*, v. *Ramchund Dutt*, I. L. R., 18 Calc., 10, referred to.

Sarabjit Singh v Raj Kumar Rai 6

CIVIL PROCEDURE CODE (1908), ORDER XXI, RULE 95 (2)—*Joint property—Ouster of one co-sharer by another—Suit for recovery of possession—Form of decree*] A person who is entitled to the possession of immovable property jointly with others may be granted a decree for joint possession—whether he was originally in possession and was subsequently dispossessed, or whether he had never been in possession. He is not merely entitled to a decree declaring his rights in the land. *Dhanraji Pandain* v. *Sheo Raj Pande*, Weekly Notes, 1906, p. 194, distinguished. *Bhairon Rai* v. *Saran Rai*, I. L. R., 20 All., 388, *Watson & Co.*, v. *Ramchund Dutt*, I. L. R., 18 Calc., 10, *Phani Singh* v. *Nawab Singh*, I. L. R., 28 All., 161, *Ram Charan Rai* v. *Kauleshar Rai*, I. L. R., 27 All., 153, and *Jagannath Ojha* v. *Ram Phal*, I. L. R., 24 All., 150, referred to.

Bisheshar Singh v. Hanuman Singh 1

——— ———, ORDER XXI, RULE 57—*Execution of decree—Order dismissing application "for the present" but maintaining attachment—Fresh attachment not necessary.*] By reason of the default of the decree-holder the court was unable to proceed with the execution of the decree and passed the following order:—"The execution case should for the time being (*filhal*) be dismissed but the attachment should remain in force," and this order was submitted to by the parties.

Held, that the order, though not the order which should have been passed, was binding upon the parties, and no fresh attachment was subsequently necessary. *Namuna Bibi* v. *Rosha Miah*, I. L. R., 38 Calc., 489, dissented from. *Dildar Husain* v. *Sheo Narain*, I. L. R., 41 All., 257, distinguished.

Muhammad Mubarak Husain v. Sabu Bimal Prasad .. 254

——— ——— ———, ORDER XXI, RULES 71 AND 84—*Execution of decree—Failure of auction purchaser to make deposit of 25 per cent.—Property re sold next morning—"Forthwith"—Order against defaulting purchaser to make good deficiency of price on re-sale—Appeal—"Decree."*] The highest bidder at an auction sale in execution of a decree failed to deposit the 25 per cent. of the purchase money which he was required by law to deposit on the spot. In consequence of this the property for sale was re-sold, and, as the first sale had taken place somewhat late in the day, the re-sale was held the following morning. The property realised a much lower price on the re-sale than it had at first, and the judgment-debtor applied for an order against the first purchaser to make good the deficiency, which he obtained.

Held that the re-sale had been held "forthwith" within the meaning of order XXI, rule 84, of the Code of Civil Procedure, and the order was a good one. It was not necessary as a condition precedent to the making of such an order that the highest bidder should have made the deposit required. *Amir Begam* v. *The Bank of Upper India, Ltd.*, I. L. R., 30 All., 273, not followed.

Held also, that the order was appealable. *Ram Dial* v. *Ram Das*, I. L. R., 1 All., 181, approved. *Deoki Nandan Rai* v. *Tapesi Lal*, I. L. R., 14 All., 201, overruled.

Sita Ram v. Janki Ram 266

CIVIL PROCEDURE CODE (1908), ORDER XXII, RULE 9(2)—*Abatement of appeal—Necessity for formal order declaring appeal to have abated—Application to set aside order of abatement.*] The abatement of a suit or appeal does not take place automatically, but it is necessary that there should be an order of the court declaring the suit or appeal to have abated, and an application to set aside such an order will lie under order XXII, rule 9(2), of the Code of Civil Procedure. *Secretary of State for India* v. *Jawahir Lal*, I. L. R., 36 All., 235, followed *Lachmi Narain* v. *Muhammad Yusuf*, I. L. R., 42 All., 540, overruled.

Gujrati v. Sital Misir 459

———, ORDER XXXIII, RULE 4—*Guardian ad litem—Suit by minor to set aside a decree against him on the ground that he was not properly represented in the former suit.*] In all cases where a minor subsequently sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into.

A joint Hindu family consisted of two persons, *G. D* and his minor cousin *F. G. D.* having executed a mortgage of the joint family property, the mortgagee brought a suit for sale against both *G D.* and *F* and nominated *G. D.* as *F's* guardian *ad litem*. Notice was served on G. D. who did not appear in answer to the notice, but, on the date fixed for the hearing appeared and confessed judgment on his own behalf and on behalf of the minor, and a decree followed. The mother of the minor was alive, but her existence was not brought to the notice of the court, nor did it appear that the court had applied its mind to the consideration of whether *G D* was a fit and proper person to represent the minor or whether even he had consented to do so. He had in fact at first refused, but this refusal was not brought to the notice of the court.

In the circumstances it was *held*, on suit by the minor to set aside the decree against him, that the minor had not been properly represented in that suit *Malkarjun* v. *Narhari*, I. L. R., 25 Bom., 337, *Watson* v. *Bankey Behari Pershad Singh*, I. L. R., 30 Calc., 1021, *The Collector of Meerut* v. *Umrao Singh*, 18 A. L. J., 417, *Rajmohan Rai* v *Dharam Deo Tewari*, I. L. R., 38 All. 815, *Ukhattar Singh* v. *Tej Singh*, I. L. R., 43 All., 104, *Kharajmal* v *Dasu*, I. L. R., 32 Calc., 296, and *Hanuman Prasad* v. *Muhammad Ishaq*, I. L. R., 28 All., 187, referred to

Murlidhar v. Pitambar Lal 528

———, ORDER XXXIV, RULES 4 AND 5—*Mortgage—Preliminary decree made on a compromise—Application for decree absolute—Plea of satisfaction of preliminary decree out of Court.*] Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree. Such proceedings are not to obtain any order absolute for sale, as used to be the case under section 89 of the Transfer of Property Act, but they are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. *Ramji Lal* v. *Karan Singh*, I. L. R., 39 All., 582, referred to.

Where the preliminary decree is based on a compromise and is in terms thereof, and is not prepared in strict accordance with order XXXIV, rule 4, it is open to the judgment-debtors, on application made for a final decree, to prove that the preliminary decree has been satisfied out of court. *Mangar Sahu* v. *Bhaloo Singh*, 57 Indian Cases, 473, referred to.

Sital Singh v. Bajnath Prasad 668

———, ORDER XLI, RULE 12, See Municipal Board 203

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CIVIL PROCEDURE CODE (1908), ORDER XLIII, RULE 1—*Appealable order—Appeal as to costs only when the substantive order is in favour of the appellant.*] If an order is itself appealable, an appeal will lie from that part of the order which relates to costs, although the substantive order may be in favour of the appellant *Balkrison Das* v. *Luchmeeput Singh*, I. L. R., 8 Calc., 91, *Moshingan* v. *Mozari Sajjad*, I. L. R., 12 Calc., 271, and *Vasudev Ramchandra* v. *Bhawan Jivraj*, I. L. R., 16 Bom., 241, followed.

Shib Kumar v. Sheo Ghulam 209

———————, ORDER XLV, RULE 7—*Act No. XXVI of 1920, section 3(1)—Extension of time for furnishing security and making deposit—Power of High Court to grant extension limited to sixty days.*] *Held*, on a construction of section 3(1) of Act No. XXVI of 1920, that the court has no power to extend the time for furnishing security and making a deposit for translation and printing by a longer period than sixty days.

Ram Dhan v. Prag Narain 216

———————, ORDER XLV, RULE 7, *See* Act No. XXVI of 1920, section 3(1) 242

———————, ORDER XLVIII, RULE 7, *See* Act No. V of 1920, sections 5, 75 (3) 603

———————, SCHEDULE II, PARAGRAPH 1—*Arbitration—Reference to arbitration made pending a reference of an appeal to the High Court under section 17 of the Ajmer Courts Regulation—Jurisdiction.*] *Held*, on a reference to the High Court under section 17 of the Ajmer Courts Regulation, that it is open to the parties to an appeal to refer the matter in dispute between them to arbitration even after they have obtained an order of reference to the High Court.

Ram Lal v. Deo Raj 91

———————, SCHEDULE II, PARAGRAPHS 5, 17—*Reference to arbitration without the intervention of court—Refusal of arbitrator to act—Application to court for order of reference.*] In the case of a private arbitrator refusing to act the court may, on the application of either party to the reference, make an order under paragraph 17 and take action under paragraph 5 by appointing a new arbitrator, although there is no provision to that effect in the deed of agreement.

Where a party has gone to arbitration in a case in which if he had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17.

Bhagwan Das v. *Gurdayal*, 19 A. L. J., 823, and *Bala Pattabhirama Chetti* v. *Seetharama Chetti*, I. L. R., 17 Madr., 198, referred to.

Fazl Ilahi v. Prag Narain 533

COMPANY, *See* Act No. VII of 1913, section 88 151

COMPROMISE, *See* Hindu law 429

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CONTRACT, *See* Act No. IX of 1872, section 25 494

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———, *See* Railway 768

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COSTS, *See* Civil Procedure Code (1908), section 11; order XXXIV, rule 10 853

——, *See* Civil Procedure Code (1908), section 144 (2) .. 887

——, *See* Civil Procedure Code (1908), order XLIII, rule 1 .. 209

COURT FEE—*Appeal—Cross objections—Petition setting forth the grounds upon which the respondents proposed to support the decree of the lower appellate court.*] *Held* that no *ad valorem* court fee was payable on a petition filed by the respondents in a second appeal, which, although it was more or less in the guise of a memorandum of cross objections, in reality contained merely the grounds upon which the respondents proposed to support the decree of the court below to which the respondents in no wise objected.

Ram Prasad *v.* Musammat Ajanasa .. 577

———, *See* Act No. VII of 1870, section 4.. 18

———, *See* Act No. VII of 1870, section 7, sub-section (iv) (*f*) .. 542

———, *See* Act No. VII of 1870, section 7, sub-section (v), (a), (b) 629

———, *See* Act (Local) No. IV of 1912, sections 37, 45 .. 706

CRIMINAL PROCEDURE CODE, SECTION 3—*Jurisdiction—Additional Sessions Judge—Appeal made over to Additional Sessions Judge, but afterwards withdrawn and tried by Sessions Judge.*] In the district of Gorakhpur, besides the Sessions Judge, two Additional Sessions Judges were appointed. And it was provided by a Government notification that the Second Additional Sessions Judge should try such cases as were made over to him to be tried by the Sessions Judge. A particular appeal was so made over to be tried, but, before it was dealt with, the Sessions Judge called up the appeal on to his own file and disposed of it himself. *Held* that in so doing the Sessions Judge did not act outside his jurisdiction.

Emperor *v* Bhju Marwari 157

———, SECTIONS 110 AND 437—*Security to keep the peace—Further inquiry.*] It is not intended that section 437 of the Code of Criminal Procedure should be used for the purpose of having a review of proceedings under section 110 of the Code merely because the District Magistrate happens to take a different view of the evidence which was before the trying Magistrate from that which the trying Magistrate himself took.

Emperor *v* Udai Raj Singh 691

———, SECTION 125—*Security to keep the peace—Grounds for cancellation of bond.*] The only ground on which a District Magistrate can cancel a bond for keeping the peace or to be of good behaviour under section 125 of the Code of Criminal Procedure is that something has supervened since the date of the first court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity for keeping the accused person under bond. A District Magistrate cannot use the section as if he were sitting as a court of appeal nor is he justified in passing an order under the section merely because he takes a different view of the evidence which has been submitted to the court of first instance.

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Banarsi Das v. Partab Singh, I. L. R., 35 All., 108, and *Emperor v. Shankar Lal*, I. L. R., 41 All., 531, followed.

Nizam-ud-din Khan v. Muhammad Zia-ul-Nabi Khan 614

CRIMINAL PROCEDURE CODE, SECTION 139—*Public nuisance—Some of the jurors refusing to return a verdict at all—Procedure.*] Where in the matter of an inquiry into an alleged public nuisance three out of the five jurors appointed under section 138 of the Code of Criminal Procedure refused to return any verdict at all, it was *held* that the Magistrate concerned was not justified in stopping the proceedings entirely, but he should have appointed a fresh jury.

Girwar Lal v. Banaidhar 575

——————, SECTIONS 202 AND 202—*Case partially inquired into—Subsequent order directing a local investigation—Results of investigation taken into consideration against accused.*] Under section 202 of the Code of Criminal Procedure a Magistrate may either inquire into the case himself or may direct a local investigation, but he cannot combine the two procedures. If a Magistrate, having partially inquired into a case, then directs a local investigation, he commits an irregularity. And if he suffers his mind to be influenced prejudicially to the accused by the results of such local investigation, his proceedings will be vitiated.

Emperor v. Durga Prasad 550

——————————, SECTION 213(2)—*Discharge—Case exclusively triable by Court of Session—Competence of Magistrate to discharge accused after taking into consideration the evidence produced for the defence.*] A magistrate inquiring into a case exclusively triable by a Court of Session is not bound to commit the case solely because the evidence for the prosecution discloses a *prima facie* case against the accused, but if the magistrate after hearing the defence witnesses comes to the conclusion that their evidence rebuts that produced for the prosecution or renders it so improbable or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge under section 213(2) of the Code of Criminal Procedure. *Dharan Singh v. Jot Prasad*, I. L. R., 37 All., 355, followed.

Muhammad Abdul Hadi v. Baldeo Sahai 57

——————————, SECTIONS 234 AND 235—*Joinder of charges—Act No. XV of 1860 (Indian Penal Code), sections 403 and 477A—Illegality.*] It is not legal to try an accused person at the same trial on three charges under section 403 and one under section 477A of the Indian Penal Code. *Emperor v. Shee Sahai Lal*, I. L. R., 32 All., 219, followed.

Emperor v. Shujt-ud-din Ahmad 540

——————————, SECTION 239—*Joint trial—Same transaction—Joint trial of the thief and of the receiver of stolen property.*] Two bicycles were stolen from different places, and in each case one Anwar, an employee of a person called Ram Saran, who kept a bicycle shop, was seen loitering in the neighbourhood about the time when the bicycles disappeared. Parts of each of the stolen bicycles were afterwards found, some in the shop of Ram Saran and some in the house of one Narbada Prasad.

Held that the joint trial of the three persons mentioned for offences under sections 379 and 411 of the Indian Penal Code was not illegal. *Emperor v. Balubhai Jiwa govind*, 6 Bom., L. R., 517, and *Jiwan v. Emperor*, 19 A. L. J., 615, referred to.

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CRIMINAL PROCEDURE CODE, SECTION 421—*Appeal—Petition from jail rejected—Petition presented thereafter through counsel not entertainable.*] Where a petition of appeal submitted through the Superintendent of the jail in which the appellant is confined has been considered and rejected by a Judge of the High Court, it is not open to the appellant thereafter to present through counsel a second petition of appeal. *Queen-Empress* v. *Bhimappa*, I. L. R., 19 Bom., 731, referred to. *Halsi* v. *Emperor*, 36 Indian Cases, 133, not followed

Emperor v. Khiali 759

——————, SECTION 423—*Revision—Powers of High Court—Power to order expunction of remarks from judgments of lower courts when such judgments are not directly before the High Court by way of appeal or revision.*] The High Court has no power to expunge from the judgments of lower courts remarks reflecting unfavourably upon the credibility or the character of witnesses, in cases in which the offensive orders of the courts are not before the High Court either in appeal or on revision. *Mohit Singh* v. *Manga Khanda*, I. L. R., 39 Calc., 157, *Emperor* v. *Ram Pyare*, I. L. R., 21 All., 158, *Abdul Begam* v. *Ali Hasan*, Weekly Notes, 1897, p. 26, and *Gopi Nath* v. *Emperor*, 3 A. L. J., 770, referred to *Baroda Nath Bhattacharjya* v. *Kurbait Sheikh*, 2 C. W. N., p. cclvi (Journal), *Ma Kaya* v. *Kin Lat Gyi*, 11 Indian Cases, 1,000, *Emperor* v. *Tammu Pethu*, 14 Indian Cases, 643, and *Lachoha* v. *Emperor*, 24 Indian Cases, 156, distinguished

Emperor v. C. Dhan 401

——————, SECTION 439, CLAUSE (4)—*Revision—Acquittal—High Court not competent to convert an acquittal into a conviction except through the medium of an appeal by the Local Government.*] An accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly.

Held, on return of the notice, that the High Court had no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction.

Emperor v. Sheo Darshan Singh 372

——————, SECTION 476—*Jurisdiction—Powers of Court which has partly heard a case subsequently transferred to another court.*] The circumstance that a case has passed out of the hands of a court, as, for instance, by an order of transfer, after it has been partly heard, does not deprive the first court of its jurisdiction to take proceedings against a witness under section 476 of the Code of Criminal Procedure, nor is that jurisdiction taken away by the circumstance that the second court may have formed a different opinion as to the veracity of the witness. *King-Emperor* v. *Kalian Singh*, Weekly Notes, 1901, p. 177, and *Ghasi Lal Sahu* v. *King-Emperor*, 6 A. L. J., 893, referred to

Emperor v. Sundar Lal 642

——————, SECTION 514—*Security to keep the peace—Proceedings for forfeiture of recognizance—Expiry of period of bond.*] Where proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given, the fact that such period has expired is no bar to their continuance. *In re Ram Chandar Lallit*, I. L. R., 13 All., 134, distinguished *Emperor* v. *Raja Ram*, I. L. R., 23 All., 292, referred to.

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DIVORCE—*Evidence—Proof of adultery in contested cases—Practice—Uncorroborated testimony of single witness—Nature of corroboration required.*] The rule of practice prevailing in the Divorce Courts in England in contested cases is that the entirely uncorroborated evidence of one person is not taken to be sufficient to establish adultery. *Evans* v. *Evans*, 1 Robert, 165, and *Simmons* v. *Simmons*, 1 Robert, 566, referred to.

Adultery can, however, be established by the entirely uncorroborated evidence of one witness as to the particular act, provided that there is evidence of a similar character in regard to other offences which can be and are treated as corroboration.

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EXECUTION OF DECREE—*Attachment—Mortgage—Execution of mortgage pending attachment under simple money decree—Civil Procedure Code, section 64; order XXI, rule 66.*] During the pendency of an attachment in execution of a simple money decree the judgment debtor executed a mortgage of the attached property

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The property was put up to sale and was purchased by the decree-holders. At the time of sale the mortgage was notified under order XXI, rule 66, of Code of Civil Procedure. The mortgagees then brought a suit to enforce their mortgage against the decree-holders auction purchasers.

Held that the notification of the mortgage at the time of sale did not prevent the auction purchasers from disputing its validity, and that in view of section 64 of the Code of Civil Procedure the mortgage was of no effect as against them. *Dinobundhu Shaw Chowdhry* v *Joomaya Da*, I. L. R., 29 Calc. 154 and *Abdul Rashid* v *Gappo Lal*, I. L. R., 20 All., 421, distinguished.

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EXECUTION OF DECREE—*General rules for Subordinate Civil, Courts, Chapter V, rule 4—Sale of property by Civil Court as non-ancestral—Subsequent suit to set aside sale on the plea that the property sold was in fact ancestral.*] Where immovable property is sold by a Civil Court as non-ancestral, the judgment-debtor having knowledge of the sale, and opportunity, if so advised, to raise the question of the nature of the property in execution, he cannot thereafter sue to set aside the sale upon the ground that the property was in fact ancestral and should not have been sold by the Civil Court. *Behari Singh* v *Mukat Singh*, I. L. R., 23 All., 273, and *Dalep Narain Singh* v *Parmanoti Bibi*, I. L. R., 42 All., 58, followed.

Bhatele Chuni Lal v. Chakrpan 380

——————— Res judicata—*Res judicata—Application of doctrine of* res judicata *re-estoppel to prevent an execution.* A decree was passed in a pre-emption suit awarding possession to the plaintiff upon payment of Rs. 1,200 within two months. On appeal the amount payable by the plaintiff was increased by Rs. 380-12-0 and the time for payment was extended to five months from the appellate court's decree. The plaintiff deposited the amount declared by the original decree to be payable and obtained possession of the property in suit. The additional sum made payable by the appellate court's decree not having been paid, the vendees applied for execution of the decree. The first application was dismissed for default. On the second application, which was for realization of the sum of Rs. 380-12-0 and costs, the plaintiff appeared and offered to pay Rs. 260 at once and the balance in two months, and this was accepted by the court, which passed orders accordingly notwithstanding the vendees' objection. Before the time so allowed had expired, the vendees put in a further application asking that the property in suit might be returned to them because the plaintiff had not complied with the terms of the appellate decree. The plaintiff thereupon deposited the balance of the sum due from him under the last order of the Court.

Held that neither the principle of *res judicata* nor the principle of estoppel debarred the vendees from taking up the position that, by reason of the plaintiff's failure to deposit the amount of the appellate court's decree within time, the suit, *ipso facto*, stood dismissed.

Ram Kirpal v. *Rup Kuari*, I. L. R., 6 All., 269, *Lakshmanan Chetti* v *Kuttayan Chetti*, I. L. R., 24 Mad., 669, *Shivraj Singh* v. *Kameshar Nath*, I. L. R., 24 All., 283, *Dambar Singh* v. *Munawar Ali Khan*, I. L. R., 37 All., 511, and *Kalyan Singh* v. *Jujan Prasad*, I. L. R., 37 All., 559, referred to.

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———, *See* Civil Procedure Code (1908), section 2, clause (12) 579

———, *See* Civil Procedure Code (1908), section 11, explanation IV: order XXI, rule 89(2) 180

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HAQ-I-CHAHARUM —*Custom—Vendor and purchaser—On whom rests the liability for payment of haq-i-chaharum*] Where the existence of a custom of payment of *haq-i-chaharum* to the zamindar on the sale of house property has been proved, and it does not appear that the zamindar's right to such payment is limited to a right to claim it from the vendor alone, it is the duty of the purchaser to see that the *haq* due to the zamindar is duly paid. He cannot relieve himself of his responsibility by simply paying the full sale consideration to the vendor. *Dhandai Bibi* v. *Abdur Rahman*, I. L. R., 23 All., 209, and *Heera Ram* v. *The Hon'ble Sir Raja Deo Narain Singh*, N.-W.P., H. C. Rep. (F. B. R.), 68, referred to.

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HINDU LAW—*Endowment—Failure of nominated manager to act—Settlor's widow competent to assume the management of the endowed property, but not to appoint a new manager by will.*] A Hindu, by deed, dated the 15th of May, 1871, created an endowment of certain property in favour of an idol, and named a certain person as manager of the endowed property. The man so nominated never in fact took charge of the property; but after the death of the settlor his widow took possession and managed the property in accordance with the intentions of her husband. The widow, however, proceeded to make a will appointing a new manager in succession to herself, and upon her death, the heir of the settlor sued to have this appointment set aside.

Held that the suit would lie. Although the widow was justified as her husband's representative in assuming charge of the endowed property, and might in her life-time have nominated a manager whose appointment would have ensured after her death, she had no power to dispose of the managership by will in the presence of an heir of the settlor.

Gossami Sri Girdharji v. *Bomanlalji Gossamiji*, I. L. R., 17 Calc., 7; *Chandranath Chakrabati* v. *Jadabevra Chakrabarti*, I. L. R., 18 All., 69; *Rajeshwar Mullick* v. *Gopeshwar Mullick*, I. L. R., 35 Calc., 226, *Sheoratan Kunwari* v. *Ram Pargan*, I. L. R., 18 All., 227, and *Sheo Prasad* v. *Aya Ram*, I. L. R., 29 All., 663, referred to.

Goswami Puran Lalji v. Rao Bihari Lal 510

——— *Female in possession for life—Compromise of claim against the estate to the detriment of the reversionary interest.*] After the death of the second of two brothers, who had been joint in estate, his daughter obtained possession of the entire property which had been of the two brothers. The daughter had an infant son, who was the next reversioner. The representatives of the first brother (two daughters) brought a suit against the daughter of the second, claiming half the estate. The defendant, without even filing a written statement or getting a guardian *ad litem* appointed for her son the reversioner, who was then a baby, compromised the suit and gave the plaintiffs half the property.

Held that the compromise so entered into was *ultra vires* and could not affect in any way the rights of the minor reversioner. *Amrit Narayan Singh* v. *Gaya Singh*, I. L. R., 45 Calc., 190, followed.

Narayan Singh v. Raj Kumar Singh 429

——— *Hindu widow—Alienation by widow—Effect of the next presumptive reversioner joining in the alienation—Estoppel—Gift.* If the next presumptive reversioner at the time of a transfer made by a Hindu widow of property of her deceased husband assents to such transfer, neither he nor any of his successors in title can afterwards dispute its validity. *Tribhuvan Chakrabarti* v. *Umesh C. Lahiri*, 7 C. L. R., 571), *Sita Das* v. *Gur Sahai*, I. L. R., 9 All., 362, *Ramadhin* v. *Mathura Singh*, I. L. R., 10 All., 107, *Shib Chandra Kar* v. *A. C. Dutchen*, 28 C. L. J., 128, *Bishtiswar* v. *Bhagwana*, I. L. R., 32 All., 176, *Venkata Row* v. *Tuljaram Row*, (1917) M. W. N., 90, and *Shanmuga Velayudhan* v. *Koyappa Chettiar*, (1920) M. W. N., 679, referred to. *Bai Parvati* v. *Dayabhai Manchharam*, I. L. R., 44 Bom., 488, not followed.

Mahadeo Prasad Singh v. Mata Prasad 44

——— *Hindu widow—Power of widow or other female limited owner to bind the estate—Legal necessity—Consent of reversioners.*] When the alienation of the whole or part of the estate in possession of a Hindu widow or other such female owner has to be supported

on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.

Where a widow or other such female owner of an estate borrows money for the purposes of the estate on a simple bond and subsequently gives the security of the estate for the payment of the debt, it is within her power to bind the estate.

Jugul Kishore v *Jotendro Mohun Tagore*, I. L. R., 10 Calc., 985, *Debi Prosad Chowdhury* v. *Golap Bhagat*, I. L. R., 10 Calc., 721, and *Rangasami Gounden* v. *Nachiappa Gounden*, 17 M. L. J., 530, referred to.

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HINDU LAW—*Hindu widow—Alienation of property of deceased husband—Small fraction alienated—Spiritual benefit of husband.*] A Hindu widow in possession of the estate of her deceased husband made a gift by deed of immovable property forming about one-seventy-fifth of the whole estate for the observance of *bhoj* (food offerings) to a deity, and for the maintenance of the priests. The gift, which was made in performance of a vow taken upon a pilgrimage to the temple, was stated by the deed to be for the salvation of the deceased husband, his family, and the widow. The widow had sufficient income to provide for the observances without an alienation of part of the estate.

Held that the alienation was valid, since the property given formed only a small fraction of the whole estate, and the gift was for the continuous spiritual benefit of the deceased husband, though not for an observance essential to the salvation according to Hindu religious law.

Observations in *Collector of Masulipa'am* v. *Cavaly Venkata Na rainapah*, 13 Moo. I. A., 529, and *Raj Lukhee Dabea* v. *Gokool Chunder Choudhry*, 13 Moo. I. A., 209, followed.

Rama v. *Ramu*, I. L. R., 8 Mad., 552, *Puppuluri Tataya* v. *Gavimilla Ramakrishnamma*, I. L. R., 84 Mad., 2-8, and *Khub Lal Singh* v. *Ajodhya Misse*, I. L. R., 43 Calc., 571, approved.

Ram Kawal Singh v. *Ram Kishore Das*, I. L. R., 22 Calc., 506, distinguished.

Judgment of the High Court (I. L. R., 41 All., 180) affirmed.

Sardar Singh *v.* Kunj Behari Lal 503

———*Joint Hindu family—Mortgage by father—After-born son's right to question validity—Suit by a son to set aside mortgage—Right of second son born pending suit to question the validity of the mortgage after death of plaintiff—Antecedent debt—Legal necessity.*] The father in a joint Hindu family consisting of himself and one son (a minor) executed a mortgage of some of the joint family property. Shortly after the execution of this mortgage, the son, under the guardianship of his uncle, filed a suit for a declaration that this mortgage was not binding on the joint family property, as it had been made without legal necessity. Pending this suit another son was born to the mortgagor. The first son died, and at a later period the representatives of the mortgagee brought a suit against the surviving son and the widow of the mortgagor for enforcement of their mortgage

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Held that the second son was not debarred from raising as a defence to the suit the same pleas as had been raised by the older son in the earlier suit. *Kesho Prasad Singh* v. *Shao Pargash Ojha*, I. L. R., 44 All., 19, and *Venkatana ayana Pillai* v. *Subbammal*, I. L. R., 38 Mad., 206, distinguished.

Held also that, part of the consideration for the mortgage being a promissory note executed very shortly before the mortgage by the mortgagor in favour of the mortgagee, it was upon the plaintiffs to show that this debt, although it might be called an antecedent debt, was borrowed for purposes which would be binding on the joint family.

Bhup Kunwar v. Balbir Sahai 190

HINDU LAW—*Joint Hindu family—Mortgage by father to pay off prior mortgage executed before the birth of his only son—Antecedent debt—Legal necessity.*] In 1900, a Hindu who had a son living, executed a mortgage of the joint family property for Rs. 8,000. Of this sum Rs 3,100 went to pay off a prior mortgage of the property executed by the father before his son was born and Rs. 800 was due to the prior mortgagee on a promissory note. The remainder was paid in cash, and it was found that this portion of the mortgage debt was undoubtedly borrowed for legal necessity. After the death of the father, the mortgagees sued the son and other persons interested, or supposed to be interested, in the mortgaged property on their mortgage.

Held that it was not open to the son to plead that there was no legal necessity to support that part of the mortgage debt which was incurred for the purpose of paying off the prior mortgage. *Sahu Ram Chandra* v *Bhup Singh*, I. L. R., 39 All., 437, and *Ram Saroop* v *Bharat Singh*, I. L. R., 43 All., 703, discussed. *Chuttan Lal* v. *Kallu*, I. L. R., 39 All., 263, referred to.

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———*Joint Hindu family—Promissory note—Competence of managing member to execute a promissory note on behalf of the family—Act No XXVI of* 1881 *(Negotiable Instruments Act), sections* 4, 25 *and* 27.] There is no inherent reason why the managing member of a joint Hindu family cannot in that capacity execute in his sole name a promissory note which shall be binding on the family as a whole and the property owned by it

Krishna Ayyar v. *Krishnasami Ayyar*, I. L. R., 23 Mad., 597, *Krishnashet bin Ganshet Shetye* v *Hari Valjibhatjee*, I. L. R., 20 Bom., 488, and *Basmat Chandra Do* v. *Ramdhon Dhor*, 11 C. W. N., 189, followed *Sadasuk Jarkh Das* v. *Sri Keshan Pershad*, I. L. R., 43 Calc., 668, distinguished.

Krishnanand Nath Khare v. Raj Ram Singh 398

———*Joint family property—Alienation—Antecedent debt—Usufructuary mortgage—Sale of equity to mortgagee—Pious obligation to pay grandfather's debts.*] A member of a Mitakshara joint family in 1904 gave a usufructuary mortgage over part of the ancestral property to secure an advance then obtained by him. In 1907 he sold the equity of redemption to the mortgagee, the mortgage being discharged out of the price and a balance paid to the mortgagor. There was no legal necessity for either transaction, but it was not proved that the money was applied by the alienor to immoral purposes. After his death, but during the life of his sons, his grandsons sued to recover the property.

Held that there was no such antecedent debt as made either the mortgage or the sale binding upon the grandsons, and that they were not, as a condition precedent to recovering the property, under

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a pious duty to repay to the vendees the money received by their grandfather. *Sahu Ram Chand* v. *Bhup Singh*, I. L. R., 39 All., 427; L. R., 44 I. A., 126, *Lachhman Prasad* v. *Saiman Singh*, I. L. R. 39 All., 500, L. R., 44 I. A., 163, and *Joji Das* v *Ganga Ram*, 21 C. W. N., 957, followed.

Judgment of the High Court affirmed.

Chet Ram v. Ram Singh 868

HINDU LAW—*Joint Hindu family—Liability of sons for father's debts—Bonds executed in renewal of previous bonds which were time-barred.*] Inasmuch as the Hindu law does not recognize any rule as to the extinction of claims by efflux of time, the sons in a joint Hindu family are not exempt from payment of bonds executed by their father merely because such bonds were given by way of renewal of other bonds which at the time of execution of the second set were barred by limitation. *Narayanasami Chetti* v. *Samidas Mudali*, I. L. R., 6 Mad., 293, followed.

Ram Kishan Rai v. Chhedi Rai 928

———*Joint Hindu family—Execution of decree—Personal decree against father—Execution taken against the joint family property—Rights of sons.*] In the case of a joint Hindu family governed by the Mitakshara law a decree against the father alone can be executed against the whole of the joint family property unless the sons can show that the debt in respect of which the decree has been obtained was a debt incurred for illegal or immoral purposes. *Karam Singh* v. *Bhup Singh*, I.L.R., 27 All., 16, *Babu Singh* v. *Bihari Lal*, I. L. R., 30 All., 156, and *Indar Pal* v. *The Imperial Bank*, I. L. R., 37 All., 214, followed. *Sahu Ram Chandra* v *Bhup Singh*, I. L. R., 39 All., 427, and *Sripat Singh Dugar* v. *Pudyal Kumar Tagore*, I. L. R., 44 Calc., 534, referred to *Sheo Dhan Singh* v. *Bhagwan Singh*, I. L. R., 43 All., 493, dissented from.

Mohan Lal v. Bihi Prasad 649

———*Joint Hindu family—Sale of family property—Legal necessity—Questions arising when sale is not supported by legal necessity as to the entire consideration.*] When the question is whether a sale of joint family property, which is only in part supported by legal necessity, shall be maintained or set aside, the criterion is not whether the bulk of the sale consideration was taken for legal necessity, but whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account. *Gridharee Lall* v. *Kantoo Lall*, L. R., 1 I. A., 321, *Gobind Singh* v *Baldeo Singh*, I. L. R., 25 All., 330, *Ram Dei Kunwar* v. *Abu Jafar*, I. L. R., 27 All., 494, *The Deputy Commissioner of Khiri* v. *Khanjan Singh*, 11 C. W. N., 474, and *Pela am Roy* v. *Bagalanand*, 14 C. W. N., 895, referred to.

Jiloamin Pande v Bhagwan Pande 683

———*Joint Hindu family—Dispute as to alienation of family property—Burden of proof.*] Although in the case of a disputed alienation or mortgage of joint family property by the father or *karta* of the family the burden of proving the legality of the transaction rests primarily on the creditor, yet in the case of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and in the absence of evidence tending to shake confidence in the transactions themselves or in the conduct and care of the manager or the creditor, the burden is shifted back on to the sons or members of the family who desire to repudiate them. *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri*, I. L. R., 44 Calc., 186; L. R., 43 I. A., 24, referred to.

Piari Lal v. Sundar Singh 756

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HINDU LAW—*Liability of son for father's debt—Debt contracted while father was a ward under the Court of Wards—Son not liable.*] A Hindu, whilst a ward of the Court of Wards, and being, under the law then in force, incompetent to enter into any contract which might involve him in pecuniary liability, executed two promissory notes. After the father's death his son executed a bond in favour of the creditor for the amount covered by the promissory notes.

Held on suit by the creditor that the son was not under a pious duty to pay the debts of the father contracted in the above circumstances and that the bond was not enforceable against him. *Rajmal Shah v Court of Wards*, 4 Indian Cases, 971, distinguished

Baldeo Prasad v. Bindeseri Prasad 388

——————*Succession—Jats—Custom amongst Jats who have migrated from the Punjab.*] *Held* that amongst Jats who have migrated to the district of Meerut from the Punjab there exists a custom by which reversioners irrespective of degree succeed equally to the last male owner, each branch of the family taking its share *per stirpes*.

Dharam Singh v. Hira 305

——————, *See* Res judicata 19

HINDU WIDOW, *See* Act No. IV of 1882, section 51 665

——— ———, *See* Hindu law 44, 95, 101

——————, *See* Res judicata 19

HOTEL-KEEPER, *See* Act No. IX of 1872, section 151 735

HUNDI, *See* Act No XXVI of 1881, sections 64 and 76 651

IDOL, *See* Act (Local) No. II of 1901, section 158 169

—— Manager of ——, *See* Act (Local) No. IV of 1912, section 55 .. 684

IMPERFECT PARTITION, *See* Pre-emption 114

INHERENT POWERS OF COURT, *See* Civil Procedure Code (1908) sections 107, 151; order XLI, rule 23 176

INJUNCTION, *See* Act No. I of 1877, section 54 608

INSOLVENCY, *See* Act No. III of 1907, section 16(2) 617

——————, *See* Act No. III of 1907, section 23 620

——— ———, *See* Act No. III of 1907, section 30(2) 296

——— ———, *See* Act No V of 1920, sections 4, 5 and 75(2) 71

——————, *See* Act No. V of 1920, section 28 (2) 316

INTEREST, *See* Act No IV of 1881, sections 68 and 84 198

——— ———, *See* Civil Procedure Code (1908), section 2, clause (12) .. 670

——————, *See* Mortgage by conditional sale 772

INTERLOCUTORY ORDER, *See* Civil Procedure Code (1908), section 105 614

"IRREGULARITY," *See* Practice 325

JAIL APPEALS, *See* Criminal Procedure Code, section 421 757

JATS, *See* Hindu law 390

JOINDER OF CHARGES, *See* Criminal Procedure Code, sections 234 and 235 540

JOINT HINDU FAMILY, *See* Act No. VII of 1870, section 7(v), (a), (b) 629

——————————, *See* Act No. IV of 1882, sections 83 and 103.. 64

——— ———, *See* Act (Local) No. II of 1901, section 201(3) 610

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JOINT HINDU FAMILY, *See* Act No V of 1920, section 28 (2) .. 3:6

———————————, *See* Hindu law .. 190, 866, 882, 889. 893-628. 649, 683, 7.6

JOINT PROPERTY, *See* Civil Procedure Code (1908), order XXI, rule 35 .. .. 1, 5

JOINT TRIAL, *See* Criminal Procedure Code, section 239 276

JURISDICTION—*Civil and Revenue Courts*—Res judicata—*Suit for ejectment as sub-tenant—Decision by Revenue Court that defendant was a tenant-in-chief—Subsequent suit in Civil Court to get round this decision.*] Where a Court of Revenue has decided a question as to the status of a tenant, neither party to the proceedings in such court can reopen the question by means of a suit in a Civil Court. *Baijit v. Mahipat*, 1 L. R., 41 All., 203, followed.

Ram Das v. Dubri Koeri, ... 724

———————*Civil and Revenue Courts—Act (Local) No. II of 1901 (Agra Tenancy Act), section 202—Lease for collection of rent and zamindari dues—Effect on position of lessee of avoidance of lease on the ground of fraud.*] A lease granted for the purpose of collection of rent and zamindari dues is not a lease granted for agricultural purposes within the meaning of section 202 of the Agra Tenancy Act, 1901.

In any case, if a lease is void *ab initio* by reason of fraud or of the unsoundness of mind of the lessor, the lessee, thereunder cannot be regarded as a tenant, but is merely a trespasser. *Ali Jafar v Phulmanta Kuar*, 13 A. L. J., 8 3, *Ryghunath v. Ganesh*, I. L. R., 42 All., 222, and *Debi Bakhsh v. Ram Dhani*, 19 Oudh Cases, 58, referred to.

Amina Bibi v. Sahib Yusuf 749

———————, *See* Act No. IX of 1887, section 35 59

———————, *See* Act (Local) No. II of 1901, sections 95 and 167 .. 692

———————, *See* Civil and Revenue Courts 686

———————, *See* Civil Procedure Code (1908), schedule II, paragraph 1 91

———————, *See* Criminal Procedure Code, section 9 157

———————, *See* Criminal Procedure Code, section 213(2) .. 57

———————, *See* Criminal Procedure Code, section 476 643

LANDLORD AND TENANT, *See* Act No. IX of 1908, schedule II, article 139 583

LEASE, *See* Act No. IX of 1872, sections 56 and 65 229

———, *See* Jurisdiction 749

LEGAL NECESSITY, *See* Act No. IV of 1882, section 5 686

———————, *See* Hindu law 95, 190, 882, 889

LEGAL PRACTITIONER, *See* Act No. XVII of 1879, section 41 (3) 352

LETTERS PATENT, SECTION 10, *See* Act No. VII of 1870, section 4 13

———————E, *See* Act no. V of 1852, section 59 726

LIMITATION, *See* Act No. I of 1872, section 124 360

———————, *See* Act No. IV of 1882, sections 74 and 95 67

———————, *See* Act No. IX of 1908, section 5 636

———————, *See* Act No. IX of 1908, schedule I, article 11A .. 607

———————, *See* Act No. IX of 1908, schedule I, article 120 .. 244

———————, *See* Act No. IX of 1908, schedule I, article 139 .. 533

———————, *See* Act No. IX of 1908, schedule I, article 182(5) .. 166

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LIMITATION, *See* Act no. IX of 1908, schedule 1, article 182 (5) .. 748

————, *See* Act No IX of 1908, schedule I, article 183 .. 565

——— —, *See* Act No XXVI of 1920, section 3 (4) 242

————, *See* Civil Procedure Code (1908), section 48, clause 2(a) .. 319

————, *See* Mortgage 77

MALICIOUS PROSECUTION, *See* Suit for malicious prosecution .. 486

MARRIAGE, *See* Muhammadan law 81

"MASHRUT-UL-DAHN," *See* Mortgage 37

MESNE PROFITS, *See* Civil Procedure Code (1908), section 2, clause (12) 579

MINOR—*Guardian ad litem—Duration of appointment—Authority of guardian not confined to original suit.*] Where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. *Jwala Dei* v. *Parbhu*, I. L. R., 14 All., 35, followed

Shambhu v. Kashaya 619

———, *See* Act No. X of 1873, section 11 117

———, *See* Act No. IV of 1882, sections 83, 84 and 103 102

MORTGAGE - *Construction of document—Usufructuary mortgage executed by two persons—Additional sum be raised by one of them with a stipulation that the mortgaged property would not be released unless both amounts were paid—"Mashrut-ul-rahn."*] One of two co-owners of property, the subject of a usufructuary mortgage, borrowed a further sum of Rs. 50 from the mortgagee and executed a deed which commenced with a reference to the share of the executant which was already mortgaged to and in the possession of the mortgagee under the mortgage of 1850; the deed then set forth that the executant was borrowing the further sum of Rs. 50 and went on to stipulate that "when I shall redeem the mortgaged land I shall also pay the said amount, with interest at the stipulated date, and then the mortgaged property shall be redeemed; without payment of the said sum the property shall not be redeemed." At the conclusion of the deed it was described as being by way of "*Mashrut-ul-rahn*"

A purchaser from the mortgagors, having paid into Court the money due on the original mortgagee and ousted the mortgagee from possession, the latter sued to recover possession relying upon the "*Mashrut-ul-rahn*" referred to above.

Held that the effect of the "*Mashrut-ul-rahn*" was to create a further usufructuary mortgage on the share of the executant, which was already under the mortgage of 1850 and was made security for the additional debt incurred, and that by the terms of that deed the mortgagee was entitled to retain possession of his share of the property until the amounts secured by the two documents were paid to him. The suit for recovery of possession was accordingly decreed in respect of the executant's share of the property.

Ranjit Singh v. *Ramdhani Singh*, I. L. R., 31 All., 432, referred to.

Har Prasad v. Ram Chandar 37

———*Contribution—Liability of auction purchaser of part of mortgaged property.*] Certain property which was subject to a mortgage was sold in execution of a simple money decree and was purchased by three separate purchasers in equal shares. Purchaser No. 2 then mortgaged his share to a Bank, which brought a suit on its mortgage and having obtained a decree, became the purchaser

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of that one-third share. The original mortgagees then brought a suit for sale on their mortgage. As to purchaser No. 1, they agreed to release his share on payment of Rs. 1,333-5-4 and also agreed to compensate him for any additional amount which he might be made to pay on account of the decree. As to purchaser No. 3, his share was sold by auction and realized Rs. 4,900. As to the Bank, its share was also sold by auction and realized Rs. 10,000, and the decree was satisfied. The Bank then sued purchasers Nos. 1 and 3 and the mortgagees for contribution.

Held that the plaintiff had no claim either as against the mortgagees or as against purchaser No. 3, but only as against purchaser No. 1, in whose case the suit had been dismissed and plaintiff had not appealed. *Sharda Chandra Mukerji* v. *Nain Sukh*, I. L. R., 23 All., 355, and *Hari Raj Singh* v. *Ahmad-ud-din Khan*, I. L. R., 19, All., 545, referred to.

Karamat Ali *v.* The Gorakhpur Bank, Limited .. 433

MORTGAGE—*Prior and subsequent mortgagees—Purchaser of mortgaged property who has paid off the earlier mortgages but not the later ones—His position as regards a subsequent mortgagee's suit for sale—Interest.*] When a purchaser of mortgaged property who has obtained possession and paid off prior mortgages sets up in defence to the suit of a subsequent mortgagee the prior mortgages which he has discharged, he is entitled to be recouped the amount which he has paid for redemption of the prior mortgages as from the date when it was paid, but he is not entitled to get interest thereon after the date of his entering into possession of the property. *Sri Ram* v *Kesri Mal*, I. L. R., 26 All., 136, followed.

Anandi Prasad Dube *v.* Krishna Chandra Mukerji .. 9

——— *Prior and subsequent mortgagees—Suit by second mortgagee for sale of the mortgaged property which had been already sold in a suit to which he was not made a party—Form of decree—Rights of auction purchaser.*] The general rule is that where a puisne mortgagee wishes to sell property which has already been sold in execution of a decree passed under a prior mortgage, the decree must direct redemption by the second mortgagee of the first mortgage and then an order for sale if the purchaser of the property does not wish to redeem the second mortgage *Campayam Venkata ramana Iyer* v *Comperta*, I. L. R., 21 Mad., 425, referred to.

This rule applies equally to auction purchasers and to private purchasers. *Mati-ullah Khan* v. *Banwari Lal*, I. L. R., 32 All., 138, and *Manohar Lal* v. *Ram Babu*, I. L. R., 34 All., 329, referred to.

In such a case the auction purchaser cannot claim to be repaid money which he has spent on improving the mortgaged property. *Campayam Venkataramana Iyer* v. *Comperta*, I. L. R., 21 Mad., 425, referred to.

Bulhi Lal *v.* The Administrator-General of Madras .. 418

——— *Prior and puisne mortgagees—Prior mortgage foreclosed without puisne mortgagees being made parties—Rights of the two mortgagees inter se.*] The owner of certain zamindari property, having mortgaged the same by way of conditional sale to the defendant, subsequently made a usufructuary mortgage of certain specific plots of land included in the first mortgage to the plaintiffs. The defendant sued for foreclosure, but without making the plaintiffs parties to this suit, and having obtained a decree got possession of the mortgaged property. The plaintiffs then sought to redeem the prior mortgage: the prior mortgagee on the other hand, plead d that he ought to be permitted to redeem the plaintiffs.

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Held that in the circumstances of the case, and more particularly to prevent further litigation in future, the equities of the case demanded rather that the defendant should be allowed to redeem the plaintiffs

Hasanbhai valad Budhanbhai v. *Umaji bin Hiraji*, I. L. R., 2 Bom., 166. *Kedar Nath* v *Sayad Hafiz Ali*, 10 Oudh Cases, 869, *Charni* v *Raj Bahadur* 2 Indian Cases, 415, *Mussammat Ram Pari* v. *Raghunath Singh*, 29 Indian Cases, 704, and *Kedar Prosanna Lahiri* v. *Girindra Prasad Sahu*, 9 C. L. J., 173, referred to

Paras Ram Singh v. Pandohi 461

MORTGAGE—*Redemption—Second suit for redemption after dismissal of first suit for failure to pay the amount decreed*—Res judicata.] Where the decree in suit for redemption of a mortgage merely provided that in default of payment of the mortgage money due the suit should be dismissed, and the money was not paid and nothing further was done, it was *held* that it was open to the mortgagor to sue again for redemption of the same mortgage. *Sita Ram* v. *Madho Lal*, I. L. R., 24 All., followed

Hari Ram v. Indraj 720

———*Right of mortgagee to enforce his whole claim against part of mortgaged property—Mortgaged property sold in execution of decree on money lent by mortgagee.*] Where property the subject of a mortgage has been broken up and various portions transferred to different alienees, the mortgagee, provided that he himself has not been a party to destroying the integrity of the mortgage, is entitled to realize his whole debt from any portion of the mortgaged property *Sheo Pahal Ojha* v *Sheolan Koli*, I. L. R., 23 All., 174, followed. *Jagat Kishore Sahu* v. *Kedar Nath*, I. L. R., 24 All., 607, distinguished

Soti Suraj Mal v Than Singh 146

———*Right to redeem—Deed excluding right—Anomalous mortgage Statute y right—Act No. IV of 1882 (Transfer of Property Act) sections 60, 93.*] Immovable property was mortgaged by deed for five years to secure a debt. The deed provided that the mortgagor was to redeem at the end of the five years, and that if he did not do so, the mortgagee was to have the option of taking possession, for a period of twelve years. If the mortgagee took possession it was provided that during the period of twelve years the mortgagor was not to be entitled to redeem, but that at the conclusion he was to do so. The mortgage debt not being repaid at the end of five years, the mortgagee took possession: in the same year the mortgagor sued to redeem.

Held that the mortgagor had by section 60 of the Transfer of Property Act, 1882, a statutory right to redeem, whether or not the mortgage was one in which by section 98 the rights and liabilities of the parties were to be determined by their contract.

Muhammad Shor Khan v. Raja Seth Swami Dayal .. 185

———*Suit for recovery of the mortgage money—Dispossession of mortgagee from part of the mortgaged property—Acquiescence of mortgagee—Ultimate possession from the remainder—Limitation—Terminus a quo.*] Plaintiff in 1894, took a usufructuary mortgage of eleven villages, knowing at the time that nine of the villages were subject to a prior mortgage. He either never obtained possession of these nine villages or he lost possession in 1837, when they were sold in execution of a decree on the prior mortgage. He however, acquiesced in the situation and apparently remained content with the possession of the remaining two villages as security

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for the money advanced by him. In 1916 plaintiff was dispossessed of the two remaining villages, and thereafter instituted a suit for the recovery of the mortgage money.

Held that in the circumstances the suit was not barred by limitation, the plaintiff's cause of action having arisen only on his dispossession from the last two villages.

Muhammad Hanif v. Ishri Prasad 77

MORTGAGE, *See* Act No. I of 1872, section 124.. 864

——— ——, *See* Act No. IV of 1882, sections 74 and 95 67

——— ——, *See* Act No. IV of 1882, section 82 708

———, *See* Act No. IV of 1882, sections 83, 84 and 103 .. 102

——— ——, *See* Act No. IV of 1882, sections 83 and 84 198

———, *See* Act No. IV of 1882, sections 83 and 103 64

———, *See* Act No. IV of 1882, section 101 359

———, See Act No. IX of 1903, schedule I, article 182 5) .. 163

———, *See* Act No. XVI of 1908, sections 33 (*a*) and 75 514

———, *See* Act (Local) No. II of 1901, section 20 .. .. 4.6

———, See Civil Procedure Code (1908), section 11; order XXXIV, rule 10 350

———, *See* Civil Procedure Code (1908), order II, rule 2(1) .. 121

———, *See* Civil Procedure Code (1908), order XXXIV, rules 4 and 5 668

———, *See* Execution of decree 714

———, *See* Hindu law 193, 368

———, *See* Pre-emption 343

MORTGAGE BY CONDITIONAL SALE—*Interest—No specific provision for post diem interest—Right of mortgagee to claim interest post diem at contractual rate.*] A mortgage by conditional sale provided for the payment of the mortgage money on a certain specified date. It also provided for the rate of interest which the mortgage money was to bear. But there was no separate provision as to interest *post diem*.

Held, on suit for foreclosure brought some years after the expiry of the term of the mortgage, that the mortgagee was entitled to claim interest at the rate stipulated for in the bond up to the date of suit. *Mathura Das* v. *Raja Narada Bahadur*, I. L. R., 19 All., 89, *Bindesri Nath* v. *Ganga Ram Sahu*, I. L. R., 20 All., 171, and *Sarada Das* v. *Jogendra Narayan Basu*, I. L. R., 32 Calc., 245, referred to.

Mahadeo Prasad v. Dhiraj Singh 772

MORTGAGE DEED, *See* Act No. I of 1870, section 92, proviso (1) .. 146

MUHAMMADAN LAW—*Gift—Taking possession—Constructively taking possession—Gift of entire zamindari estate—Possession taken of part only—Donor reserving usufruct of part—Construction of deed—Whether gift or will.*] The widow of a Sunni Muhammadan had the right of an owner under Muhammadan law to dispose by gift or will of an estate. By a deed executed in 1884 she "made a gift of the entire zamindari estate" to the brother of her deceased husband "with the exception of the villages and six lands of the estates, specified below, which shall, during my life-time, remain in my and my relation's possession, free of rent and without payment of Government revenue; and I do hereby invest the donee with the power to have the mutation of name effected in his favour. Now I have nothing to do with the gifted property and estate. I

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shall keep the villages and *sir* lands, which have been exempted hereunder, for my life-time without the power of alienation by mortgage, sale and gift; and after me, the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the ilaqa." On the execution of the deed the donee took possession of the estate with the exception of the specified villages and *sir* lands. He thereafter paid the Government revenue upon the excepted villages and *sir* lands, but there was no mutation of names as to them, nor did he take possession, until the death of the donor in 1926.

Held that the deed should be read as making a gift *inter vivos* of the excepted villages and *sir* lands, and not as a disposition of them by will; and that as there was a gift of the entire zamindari estate with possession taken of part, possession of the excepted villages and *sir* lands had been taken constructively, so as to satisfy the requirements of Muhammadan law as to gifts.

Umjad Ally Khan v. *Muhamdee Begam*, 11 Moo. I. A., 517 followed as to the validity of a gift reserving a right to instruct.

Judgment of the Court of the Judicial Commissioner affirmed.

Muhammad Abdul Ghani v. Fakar Jahan Begam .. 801

MUHAMMADAN LAW—*Gift—Condition against alienation—Such a condition between Muhammadans invalid*] The mere fact that as between two Muhammadans are governed by the Muhammadan law and not by the Transfer of Property Act, 1882. A provision purporting to take away the donee's power of transfer is under the Muhammadan law invalid, the donee will, in despite thereof, take an absolute estate

Abdul Karim Khan v. *Abdul Qayum Khan*, I. L. R., 98 All., 342 and *Nisam-ud-din Ghulam* v. *Abdul Ghafar*, I. L. R., 13 Bom., 264, referred to

Pabu Lal v. Ghanshyam Das 699

——————— *Bila-bil-ewaz—Passing of consideration necessary to validate gift*] In the case of the transaction which is known of the Muhammadan law as *bila-bil-ewaz*, actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself in praesenti of the property and to confer it upon the donee must also be proved *Ghaus Ali Shah* v. *Muhammad Hasan*, I. L. R., 28 All., 429, followed.

Mohan Lal v. Mahmud Husain 330

——————— *Sunnis—Right of woman to repudiate a marriage performed during minority—Exercise of right of repudiation dependent on knowledge of the woman that she has such right*] *Held*, following the rule laid down by Imam Muhammad as the more reasonable and equitable rule to be applied in India, that amongst Sunni Muhammadans the right of repudiation exercisable by a girl married during her minority depends upon her knowledge that she has such right, and may be enforced within a reasonable time after she comes to know of its existence

Bismillah Pegam v. Nur Muhammad 61

———————, *See* Pre-emption 88, 114

MUKHTAR-A'AM, *See* Act No. IX of 1908, section 19 641

MUNICIPAL BOARD—*Action against board on account of mistake in omission of plaintiff in the roll of candidates, whereby he could have received offer himself for election—Liability of board—Principal and agent—Discovery of documents—Civil Procedure Code* (1908), *order X, rule 12*] If any duly qualified citizen, or person not ill-fated to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote and so as to give the returning officer an adequate ground for refusing him the right to vote on

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election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful, he has suffered a legal wrong; he has been deprived of a right recognized by law, and he has against the person so depriving him a remedy by what has always been called "an action on the case" for nominal damages for the right that he has lost, which may, at the discretion of the court, be punitive or exemplary, if the conduct is the result of some malicious and wicked intention and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example, efforts to replace his name on the roll.

Where such an action is brought against a municipal board the complaint being that the list of candidates has been so tampered with as to deprive the plaintiff of his right to offer himself as a candidate, the question of the corporate liability of the board and the individual liability of its officers or servants must be determined according to the general law of principal and agent.

In a case where the plaintiff is of necessity dependent for proof of his allegations upon documents in the possession of the defendant, of the precise nature of which he cannot be aware, the plaintiff's proper course is to apply to the court for an order under order XI, rule 12, of the Code of Civil Procedure.

Municipal Board of Agra v. Asharfi Lal 202

NOTICE, *See* Civil Procedure Code (1908), order I, rule 8 231

NOTICE OF SUIT, *See* Act No. IX of 1890, section 77 646

OATH, *See* Act No. X of 1873, section 11 117

OCCUPANCY HOLDING, *See* Act (Local) No. II of 1901, section 20 .. 486

— — — — — —, *See* Act (Local) No. II of 1901, section 22 .. 376

OCCUPANCY TENANT, *See* Act (Local) No. II of 1901, section 22 .. 327

"OFFICIAL CONFIDENCE," *See* Act No. I of 1872, section 124 .. 300

OSTENSIBLE OWNER, *See* Act No. IV of 1882, section 41 .. 674

PARTITION, *See* Act (Local) No. III of 1901, sections 111 and 233(*b*) .. 74

PATENT MEDICINE, *See* Act No. I of 1877, section 54 608

PENSION, *See* Act No. XXII, section 7 697

— — —, *See* Act No. XXIII of 1871, sections 11 and 13 .. 634

PLEADINGS, *See* Pre-emption 671

POST DIEM INTEREST, *See* Mortgage by conditional sale .. 772

PRACTICE—*Subordinate courts—Rules of High Court prescribing hours of sitting for subordinate courts—Case taken up after 5 p.m.—Material irregularity.*] Where a court subordinate to the High Court, in contravention of a rule of the Court prescribing certain usual hours of sitting for subordinate courts, took up a fresh case after 5 p.m., and dismissed it on account of the absence of the plaintiff, it was *held* that this amounted to a material irregularity justifying the intervention of the High Court.

Bevis and Co. v. Ram Prasad 325

————, *See* Divorce 204

————, *See* Suit for dissolution of marriage 745

PRE-EMPTION—*Pleadings—Suit based on oral custom set up in plaint—Finding of want of proof—Case of contract set up in appeal—Remand—Form of order.*] In a suit for pre-emption based on an alleged custom the court of first instance found that the custom was not proved, and accordingly dismissed the suit. On appeal the plaintiff raised an oral plea that the village papers afforded evidence of a

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subsisting contract which would support a decree in the plaintiff's favour. With reference to this plea the lower appellate court set aside the decree of the first court and remanded the case for trial on the merits.

Held, that the proper course for the lower appellate court was to remand the case with permission to the plaintiff to amend his plaint, basing his case on the ground of contract, the defendants being allowed to put in their defence to the new plea and to produce evidence, if necessary. *Ram Gharib Tewari* v. *Shanka Tewari*, 20 A. L. J., 16, referred to.

Baldeo Rai v. Jhagru Rai 371

PRE-EMPTION—*Muhammadan law—Pre-emptor and vendee both belonging to same category of pre-emption*. According to the Muhammadan law of pre-emption, where it is to the vendee and the pre-emptor are in the same category of pre-emption, the result is, not the dismissal of the suit, but that the property is to be shared equally by the two claimants. *Amir Hasan* v. *Ibrahim Bakhsh*, I. L. R., 18 All., 405, and *Abdulla* v. *Amanat-ullah*, I. L. R., 21 All., 293, followed. *Lalla Nowbut Lall* v. *Lalla Jadoon Lall*, I. L. R., 4 Calc., 831, distinguished from. *Baldeo* v. *Bachi Nath*, I. L. R., 31 All., 619, not followed.

Muhammad Yakub v. Kanhai Lal 83

———*Muhammadan law—Shafi Sharik—Loss of right of pre-emption—Imperfectly partitioned mahal*. In the case of zamindari property, which the Muhammadan law of pre-emption applies, the basis of the right of pre-emption as a shafi-sharik is the common liability for payment of Government revenue. Where, therefore, the property sold is part of an imperfectly partitioned mahal it does not make any difference with regard to the loss of own shares within the same sub-division of the mahal as the share sold or not. *Jaita Lal Saha* v. *Janki Kuar*, I. L. R., 33 Calc., 915, referred to

Said-ud-din v. Latif-un-nisa Bibi 114

———*Sale consideration in part cash and in part a mortgage of the property purchased—Mortgage binding on pre-emptor*. A house was sold for a consideration which was partly cash and partly a mortgage upon the house.

Held that a successful pre-emptor would be bound to pay off the mortgage before he was entitled to possession. *Kunta Prasad* v. *Mohan Bhagat*, I. L. R., 33 All., 45, distinguished.

Sechan Lal v. Kishan Lal 349

———, *See* Act No X of 1873, section 11 117

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PROCEDURE, *See* Criminal Procedure Code, section 139 575

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———————, *See* Criminal Procedure Code, section 239 276

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PRODUCTION OF DOCUMENTS, *See* Civil Procedure Code (1908), order XI, rules 14, 18 and 21 585

PROMISSORY NOTE, *See* Act No. I of 1872, section 92 521

———————, *See* Act No. XXVI of 1881, section 78 .. 290

———————, *See* Hindu law 893

"PUBLIC PLACE," *See* Act no. III of 1857, section 13 205

PUBLIC NUISANCE, *See* Criminal Procedure Code, section 139 .. 576

RAILWAY—*Suit for compensation for goods damaged in transit—Suit brought against one company only out of several over whose lines the goods passed—Offer of compensation made unconditionally by one of the railway companies concerned—Refusal to take delivery on refusal of railway to record damaged condition—Right of sale of goods thereafter.*] Certain bales of cotton were despatched from Jaipur to Mirzapur, were they arrived in a more or less damaged condition. In the course of transit the goods passed over parts of four separate railway systems. On the arrival of the goods at Mirzapur, the consignees demanded that the local railway (East Indian Railway, officials should make a record of their condition, and on these officials refusing to do so, declined to take delivery. The question of the amount of damage was inquired into by certain of the higher railway officials and the consignees were offered compensation, first at the rate of Rs 10 and afterwards at the rate of Rs. 20 per bale. The consignees refused to accept either offer and refused to remove the goods, and these were ultimately sold by the Railway authorities. The consignees then sued the East Indian Railway Company alone, claiming heavy damages on account of the alleged illegal sale of their property and also on account of injury to the same as above described.

Held (1) that the defendants were acting within their rights in selling the goods when the consignees would not take delivery, and (2) that, although the plaintiffs would not ordinarily be entitled to a decree against the defendants, who were not the railway company to whom the goods were delivered by the consignor, unless they could show that the goods suffered damage whilst in their custody, on the other hand the defendants had not, in offering to compensate the plaintiffs, protected themselves by making their offer "without prejudice," and they must therefore be held liable to the extent of the higher offer made.

But, in view of their conduct throughout, the plaintiffs were directed to pay the whole costs of the defendants.

Sri Ganga Cotton Mills Company, Ltd. *v.* East Indian Railway Company 763

RAILWAY. SUIT AGAINST—, *See* Act No. IX of 1890, section 77 .. 645

RAILWAY COMPANY, *See* Act No. IX of 1890, sections 47, 54 and 73 218

RECEIVER, *See* Act No. III of 1907, section 16(2) 617

RECOGNIZANCE. FORFEITURE OF—, *See* Criminal Procedure Code, section 514 657

REDEMPTION, *See* Mortgage 155, 730

REGULATIONS—1877—III (AJMER LAWS), SECTIONS 6 AND 9—*Pre-emption "Sale"—Possession given and price paid, but no deed of sale executed.*] *Held* that according to the law in Ajmer-Merwara a right of pre-emption may be enforced where possession of the

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property claimed has been delivered and the price paid, although no deed of sale has been executed and registered. *Begam* v. *Muhammad Yakub*, I. L. R., 16 All., 344, referred to.

Ram Sukh v Mrs. L. E. O'Neil 289

REGISTRATION, *See* Act No. XVI of 1908, sections 33 (a), 75 .. 514

RELIGIOUS ENDOWMENT, *See* Act No. XX of 1863, sections 8 and 7 677

REMAND, *See* Civil Procedure Code (1908), section 24; order XLI, rule 23 211

———, *See* Civil Procedure Code (1908), sections 104, 107, 151; order XLI, rule 23, and order XLIII 492

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———, *See* Pre emption 571

RENT-FREE GRANT, *See* Act (Local) No. II of 1901, section 156 .. 160

RES JUDICATA—*Civil Procedure Code* (1908), *section* 11, *Explanation VI—Hindu law—Reversioners—Alienation by widow—Effect of suit by nearest presumptive reversioner during widow's life-time on subsequent suit after widow's death between actual reversioner and the alienee.*] A suit by a reversioner for setting aside an alienation made by a Hindu widow in possession is brought by him in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate. A decree in such a suit is therefore binding, not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. This is so, not because one reversioner must in that case be deemed to claim through another, but because the reversioner who sues represents the others and explanation VI to section 11 of the Code of Civil Procedure comes into operation *Chhaidu Singh* v. *Durga Dei*, I. L. R., 22 All., 382, and *Darbari Lal* v. *Govind Ram*, I. L. R., 43 All., 514, overruled. *Venkatanarayana Pillai* v *Subbammal*, I. L. R., 39 Mad., 605, *Janaki Ammal* v *Narayanasami Aiyar*, I. L. R., 39 Mad., 994, *Varamma* v. *Gopalakrayya*, I. L. R., 41 Mad., 559, and *Bhagwanta* v *Sukhi*, I. L. R., 22 All., 33, referred to.

Keshe Prasad Singh v. Shee Pargash Ojha 19

———, *See* Civil Procedure Code (1908), section 11 334, 713

———, *See* Civil Procedure Code (1908), section 11, explanation IV, order XXI, rule 50(2) 130

———, *See* Civil Procedure Code (1908), section 11, order XXXIV, rule 10 300

———, *See* Execution of decree 159

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RESTITUTION, *See* Act No. IX of 1908, schedule I, article 183 .. 555

———, Application for, in Court of Revenue, *See* Act (Local) No. II of 1901, section 177 389

REVERSIONER, *See* Hindu law 95, 428

———, *See* Res judicata 19

REVIEW OF JUDGMENT, *See* Act No. V of 1920, sections 5, 75(3) .. 600

REVISION, *See* Civil Procedure Code (1908), section 115 218

———, *See* Criminal Procedure Code, section 423 401

———, *See* Criminal Procedure Code, section 439, clause (4) .. 332

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ROBBERY, *See* Act No. XLV of 1860, sections 390 and 392.. .. 588

RULES FOR SUBORDINATE CIVIL COURTS, CHAPTER V, RULE 4, *See* Execution of decree 380

SALE, *See* Regulation No. III of 1877, sections 6 and 9 239

SECOND APPEAL—*Hindu family—Question of jointness or separation—Finding of fact or law.*] The question whether a Hindu family is joint or separate is not necessarily a question of fact merely, but in certain circumstances may be a mixed question of fact and law and open to reconsideration by the High Court in second appeal.

Sabal Singh v. Salik Ram Singh 602

SECURITY TO KEEP THE PEACE, *See* Criminal Procedure Code, sections 110 and 437 691

———————, *See* Criminal Procedure Code, section 125.. 614

———————, *See* Criminal Procedure Code, section 514.. 657

SENTENCE, *See* Act No XLV of 1860, sections 380 and 392 .. 588

SHARE REGISTER, *See* Act No. VII of 1913, section 38 151

SPECIFIC RELIEF—*Suit by purchaser deprived of property in consequence of a decree for specific performance to recover consideration money from successful plaintiffs—Equitable relief—Privity of contract.*] *B* agreed to sell certain property to *N* and *D* with the object of paying off a decree held against him by *S*. The terms of the sale were that Rs. 100 was to be paid as earnest money, Rs 100 in cash, and Rs 2,000 was to be paid to the decree-holder.

Thereafter *B*, instead of carrying out this agreement, sold the property in question to *S* himself for Re. 3,500, of which Rs. 3,034-6-0 were credited in payment of the decree, satisfaction of which was entered up, and the balance was paid in cash to the vendor.

N and *D* then sued *B* and *S* for specific performance of the agreement to sell to them, and on appeal obtained a decree from the High Court, in pursuance of which a conveyance was executed and *S* lost possession of the property.

The surviving brothers of *S*, who had died meanwhile, then sued *N* and *D* to recover from them the sum of Rs. 3,034-6-0, the part of the consideration for the sale to *S* which had been applied in satisfaction of his decree.

Held that the suit would lie, and the plaintiffs were entitled to recover, but only to the extent of Rs. 2,000, the amount which, under the original agreement between *B* and the defendants, was declared payable to the decree-holder *S*.

Debnarayan Datt v. *Chunilal Ghose*, I. L. R., 41 Calc., 137, referred to.

Nihal Singh v. Fateh Chand 702

STAMP, *See* Act No. I of 1899, schedule I, article 38 899

SUBORDINATE COURTS. Hours of sitting of——, *See* Practice .. 325

SUCCESSION, *See* Act No. I of 1869, section 23.. 449

———————, *See* Act (Local) No. II of 1901, section 22 327

———————, *See* Act (Local) No. II of 1901, section 22 376

———————, *See* Hindu law 290

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SUIT AGAINST SECRETARY OF STATE FOR INDIA IN COUNCIL.—*Cause of action—Plaintiff deprived of goods by erroneous order of Magistrate.*] The plaintiff came into court on the following allegations: that he, being in lawful possession as pawnee of certain ornaments, had made over the same to the Court Inspector of Fyzabad, as they were required to be produced in a criminal case. Subsequently, however, the ornaments, instead of being returned to him, were made over by the court of the Paigana Officer at Fyzabad to the original owner, one Pashpat Nath. The plaintiff, therefore, sued the Secretary of State for India in Council for damages.

Held that the plaint disclosed no cause of action against the Secretary of State. *The Secretary of State for India* v. *Sukhdeo*, I. L. R., 21 All., 341, followed.

Panchayati Akhara Maha Nirbani v. The Secretary of State for India in Council 573

—— AGAINST A RAILWAY, *See* Act No. IX of 1890, section 77 .. 645

—— BY A MUHAMMADAN HEIR FOR SHARE IN INHERITANCE, *See* Act No. IX of 1908, schedule I, article 120 244

—— FOR ACCOUNTS, *See* Act No. VI of 1879, section 7, sub-section (iv) (*f*) 542

—— FOR DAMAGES, *See* Civil Procedure Code (1908), section 115 (2) .. 687

—— FOR DAMAGES FOR MALICIOUS PROSECUTION—*Burden of proof—Production of judgment of criminal court not by itself sufficient to prove falsity of accusation.*] In an action for malicious prosecution it is not sufficient, in order to prove the falsity of the accusation, for the plaintiff to put in the judgment of the criminal court which terminated in his acquittal. *Abrath* v. *The North-Eastern Railway Company*, L. R. 11 Q. B. D., 440 referred to.

Gobardhan Singh v. Ram Badan Singh 385

—— FOR DISSOLUTION OF MARRIAGE—*Procedure—Necessity of examining petitioner on oath.*] In all divorce cases the petitioner must come into the witness-box, he must be sworn, and he must prove his case, because, amongst other things, the Judge has to satisfy himself whether there is any collusion between the parties, and he has further to satisfy himself as to the complete honesty and truth of the petition

Howard v. Howard 729

——— *Petition for dissolution by husband on the ground of adultery—Respondent not represented by counsel—Duty of petitioner to provide respondent with means of obtaining legal assistance—Practice.*] Where, in a petition for dissolution of marriage upon the ground of adultery filed by the husband, the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from counsel as is reasonable in the circumstances, and the Court should take upon itself the duty of seeing that this is done.

Garlinge v Garlinge 745

—— FOR EJECTMENT, *See* Act No. IX of 1908, schedule I, article 139 .. 583

———, *See* Act (Local) No. II of 1901, section 177 .. 283

—— FOR JOINT POSSESSION, *See* Civil Procedure Code (1908), order XX, rule 35 .. .. 1 & 5

—— FOR PROFITS, *See* Act (Local) No. II of 1901, section 201 (3) .. 250

———, *See* Act (Local) No. II of 1901, section 201 412

———, *See* Act (Local) No. II of 1901, section 201 (3) .. 616

—— FOR RECOVERY OF MORTGAGE MONEY, *See* Mortgage 77

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UIT IN REPRESENTATIVE CAPACITY, *See* Civil Procedure Code (1908), order 1, rule 8 231

—— RELATING TO A PUBLIC CHARITABLE OR RELIGIOUS TRUST, *See* Civil Procedure Code (1908), section 92 652

SURETY, *See* Civil Procedure Code (1908), section 145 174

TRANSFER, *See* Civil Procedure Code (1908), section 24; order XLI, rule 23 211

————, *See* Civil Procedure Code (1908), section 24 278

————, *See* Criminal Procedure Code, section 476 642

TRUST, *See* Civil Procedure Code (1908), section 92 .. 622, 662, 721

VENDOR AND PURCHASER, *See Haq-i-chaharum* 739

WHIPPING, *See* Act No. XLV of 1860, sections 330 and 332 .. 638

WILL—*Construction of document—Omission of words limiting the estate which the testatrix apparently intended to bequeath.*] The will, executed in 1901, of a Mrs. M J Marten, purported to give to her two sons Harry Kenneth and Frederick William all her estate and effects in equal shares for their own use and benefit absolutely and for ever and then proceeded :—

"I further direct that on the death of either of my sons above named his share of the property herein bequeathed shall go in the first instance to his children, and grandchildren, etc., in the direct line, if there be any at the time, but not to the widow or any other person, but, failing his children and grandchildren, as aforesaid, the property herein bequeathed shall revert immediately to the children and grandchildren, etc., in the direct line, of the surviving son, and, failing the children and grandchildren, etc., of the surviving son, to the surviving son himself, and then ultimately failing him it shall revert to the widow or widows of both of the deceased sons."

"I further direct that if the said Harry Kenneth Marten and Frederick William Marten cannot live jointly and enjoy the estates herein bequeathed to them jointly, they will divide the property bequeathed into two equal shares and will enjoy their respective shares absolutely and as full owners for their lives and after that, the property shall revert to their heirs in the manner and order indicated hereinbefore."

Both the sons died—Harry Kenneth in 1915 and Frederick William in 1917—without issue.

Held that, whatever may have been the intention of the testatrix, Frederick William took an absolute estate in the share which came to him on the death of his brother. *Lyny* v. *Lord Strafford*, 5 Beavan, 558, referred to.

Marten *v.* Hirde Ram 397

WILL—*Construction—Land in Oudh—"Sir land"—Lands given to wife for maintenance—Entire village—Assessment to rent—Act No. XXII of* 1886 *(Oudh Rent Act), sections* 67, 107*G.*] The proprietor of land in Oudh by his will devised his estate to his nephew, but provided that his widow should get from the estate an allowance in cash "besides the *sir* lands in his possession *(zirat maqbuza)*." The testator had during his life handed over to his wife plots of *sir* land in certain villages; and in 1911 had petitioned stating that he had given an entire village to her as "*muafi*" revenue free, and praying for mutation of names, and an entry had been made in the register accordingly. At the first regular settlement the village had been entered in the register as "*sir*" land in possession of the then proprietor's wife for her maintenance, but owing

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to a change in the practice of the revenue authorities as to what constituted "sir" land it had since been registered as "*muafi*." Upon the death of the testator in 1913, his nephew, who succeeded under the will, claimed the village to have the village assessed to rent under section 104 of Act XXII of 1868; section 76 of that Act places a restricted meaning on "*sir*."

Held that the words of the will covered not only land which could accurately be described as "*sir*," but also the village; that the widow was under the will proprietor for her life and the testator's nephew was not entitled to have rent assessed under Act XXII of 1868.

Parbati Kunwar v. *Deputy Commissioner of Khori*, I. L. R., 40 All., 541, distinguished.

Judgment of the Board of Revenue reversed; judgment of the Court of the Judicial Commissioner affirmed.

Observation as to the inclusion of a large number of irrelevant documents in the record as sent from India.

Jai Indar Bahadur Singh v. Rani Bijai Raj Kunwar .. 485

WILL—*Proof of execution—Evidence—Attesting witnesses*] Upon an issue whether the signature to a will is genuine or a forgery, the best evidence procurable of signature of the document by the testator should be furnished; an attempt to support the signature by anything which falls short of that standard, though it may not be fatal, is a serious defect. The absence of any of the attesting witnesses who are not called should be satisfactorily accounted for. Evidence to the effect that the signature appears to be genuine is of little worth in the absence of reliable evidence by witnesses present when the will was signed.

Judgment of the High Court reversed.

Ram Gopal Lal v. Aigna Kunwar 495

WITNESS, *See* Will 495

THE INDIAN LAW REPORTS.

ALLAHABAD SERIES.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BISHESHAR SINGH (PLAINTIFF) *v.* HANUMAN SINGH (DEFENDANT) *. 1921 *June*, 14.

Civil Procedure Code (1908), order XXI, rule 95 (2)—Joint property—Ouster of one co-sharer by another—Suit for recovery of joint possession—Form of decree.

A person who is entitled to the possession of immovable property jointly with others may be granted a decree for joint possession—whether he was originally in possession and was subsequently dispossessed, or whether he had never been in possession. He is not merely entitled to a decree declaring his rights in the land. *Dhanraji Pandam* v. *Shio Raj Panda* (1, distinguished. *Bhairon Rai* v. *Saran Rai* (2), *Watson & Co.* v. *Ramchund Dutt* (3), *Phani Singh* v. *Nawab Singh* (4), *Ram Charan Rai* v. *Kauleshar Rai* (5) and *Jagannath Ojha* v. *Ram Phal* (6) referred to.

THE facts of this case are set forth in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in this appeal relates to certain plots of land, situate in shamilat patti Pami in mauza Kura Kanik. The plaintiff is one of the co-sharers of that village. So is the defendant.

The land was originally a part of the shamilat land of that village, yielding grass, to the benefit of which, according to the plaintiff, both the parties were entitled.

* Second Appeal No. 843 of 1919, from a decree of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 7th of April, 1919, confirming a decree of Ganga Prasad Varma, Munsif of Fatehpur, dated the 10th of December, 1918.

(1) Weekly Notes, 1906, p. 194.
(2) (1904) I. L. R., 26 All., 583.
(3) (1890) I. L. R., 18 Calc., 10.
(4) (1905) I. L. R., 28 All., 161.
(5) (1904) I. L. R., 27 All., 153.
(6) (1911) I. L. R., 34 All., 150.

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The allegation of the plaintiff was that up to 1323 Fasli the plaintiff used to take the grass of the southern half of the land and the defendant used to take the grass of the northern half of the land. There was further allegation that in the year 1324 Fasli the land became fertile owing to the deposit of silt from the river Jumna and that the parties cultivated their respective half shares and appropriated the profits of their shares of the land that year. There was also an allegation that in 1325 Fasli the defendant ousted the plaintiff and took up wrongful cultivation of the entire land, thereby depriving the plaintiff of his right.

The defendant pleaded that the land in question was his separate property; that he had been in separate possession of the same, and that the plaintiff had never been in possession of any portion thereof, at any rate within 12 years prior to the suit. The courts below dismissed the claim for joint possession and passed a decree for a declaration that the plaintiff and the defendant were entitled to the land in dispute as co-sharers along with the other co-sharers of patti Pami. The court of first instance took the view that in 1324 Fasli, the plaintiff and the defendant had jointly cultivated the land after the river had receded, leaving a deposit of silt on the land. The lower appellate court, however, expressed no opinion on that point. It relied on the decision in the case of *Dhanraji Pandain* v. *Sheo Raj Pande* (1) in support of the proposition that the plaintiff was not entitled to a decree for joint possession.

We do not consider, however, that that decision is applicable. The plaintiff there claimed exclusive possession of certain land, on which the defendant had constructed a shed and planted certain trees, and the finding was that the former was not entitled to exclusive possession. In *Bhairon Rai* v. *Saran Rai* (2) it was held by a Full Bench that if a plaintiff was in joint possession of certain property and was illegally ousted from joint possession of any portion thereof by a co-owner, he was entitled to be restored to such joint possession. As a general rule no co-sharer has a right to appropriate a specific portion of the common land to his exclusive use and thereby to exclude his co-sharers from

(1) Weekly Notes, 1906, p. 194. (2) (1904) I. L. R., 26 All., 588.

all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for a long time without any let or hindrance by the other co-sharers, or where he has been so in possession jointly with some other co-sharers, he is entitled to continue in possession till a partition is effected. His possession must, however, be either physical or constructive through his own tenants, and not under a right to hold, common to or exercised by all the co-sharers.

The governing principle applicable to such cases has been laid down in *Watson and Co* v. *Ramchund Dutt* (1) where Sir BARNES PEACOCK, who delivered the judgment of the Judicial Committee, observed :—

"It seems to their Lordships that if there be two or more tenants in common and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation, as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession." His Lordship then went on to explain :—"In India a large proportion of the lands, including many very large estates, are held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which in ordinary course, in large estates, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle and greatly deteriorate in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according

(1) (1890) L.R., 18 Calc., 10.

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to justice, equity, and good conscience, and if, in a case of share-holders holding lands in common, it should be found that one co-sharer is in the act of cultivating a portion of the lands, *which is not being actually used by another*, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital."

In *Phani Singh* v. *Nawab Singh* (1) one of the co-sharers had taken possession of certain land on the death of a common tenant, who had been cultivating the same, and the decree passed by this Court was that the plaintiffs and the defendant, as co-sharers of the village, were entitled to joint possession of the land in suit, and that neither was entitled to possession to the exclusion of the other. An injunction to restrain the defendant from dealing with the land by cultivating it, letting it to tenants, or receiving the rents and profits of it in any way to the exclusion of the plaintiffs without their consent, was refused. In *Ram Charan Rai* v. *Kauleshar Rai* (2) the plaintiff was found to have been in joint possession of the disputed land prior to his dispossession and was held entitled to be restored to his former possession.

The same matter was again considered in the case of *Jagarnath Ojha* v. *Ram Phal* (3) and the view taken by this Court was that the plaintiff, who was entitled to possession jointly with other persons, could be granted a decree for joint possession, whether the plaintiff was originally in joint possession and was subsequently dispossessed, or whether he had never been in possession. That principle has now been recognized by order 21, rule 35, of the Code of Civil Procedure, which prescribed the manner in which a decree for joint possession can be executed.

The lower appellate court here held that neither party was in possession of the disputed land till it was brought under cultivation in 1324 Fasli, but it omitted to decide by whom the said land was cultivated in that year after it had become culturable by the deposit of silt from the river Jumna. The khasra for 1324, which the trial court accepted, however, proves that

(1) (1905) I. L. R., 28 All., 161. (2) (1904) I. L. R., 27 All., 153.
(3) (1911) I. L. R., 34 All., 150.

the parties had been in actual cultivatory possession, and, that being so, we are of opinion that the defendant had no right to oust him, and the plaintiff is entitled to a decree for joint possession without prejudice to the rights of the other co-sharers of the village.

The appeal is, therefore, allowed to this extent that the plaintiff will be granted a decree for joint possession subject to the rights of the other co-sharers of the village.

The parties will bear their own costs in all the courts.

Appeal decreed.

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June, 14.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

SARABJIT SINGH (PLAINTIFF) *v.* RAJ KUMAR RAI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (1908), order XXI, rule 35—Co-sharers jointly in possession—One co-sharer ousted by another Suit for possession and profits by way of damages—Decree given for joint possession but not for profits.

The plaintiff and the predecessor in title of the defendants were joint owners of certain zamindari and at one time were in joint cultivatory possession. They then leased the land to a tenant. Subsequently the tenant surrendered the land to the predecessor in title of the defendants, who then proceeded to exclude the plaintiff.

Held that the plaintiff was entitled in the circumstances to a decree for joint possession, though not to a decree for profits by way of damages. Such profits could be taken into account when the annual accounts of the village income were adjusted. *Watson & Co* v. *Ramchand Dutt* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

This case was first heard by a single Judge who passed the following referring order :—

STUART, J.:—These are the facts :—Babban Singh, Mahadeo Singh and Sital Singh owned certain property. Sital Singh sold his share. Raj Kumar Rai, in the exercise of a right of pre-emption, purchased his share. Certain land was *khudkasht* of all the three sharers. This was cultivated by Thagai. Thagai relinquished it in favour of Raj Kumar Rai only, who has taken

* Second Appeal No. 904 of 1919, from a decree of Jotindra Mohan Basu, Additional Judge of Gorakhpur, dated the 15th of April, 1919, confirming a decree of Lakshmi Narayan Tandon, Munsif of Deoria, dated the 9th of January, 1919.

(1) (1890) I. L. R., 18 Calc., 10.

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sole possession of it. The plaintiffs, who represent Babban Singh and Mahadeo Singh, sued Raj Kumar Rai for possession of the plot and for damages. The trial court dismissed their suit for possession and damages but granted them a declaration that the land was their joint *kudhkasht*. They appealed against the dismissal of their claim for possession and damages. The lower appellate court dismissed their appeal, relaying on the decision in *Jagar Nath Singh* v. *Jai Nath Singh* (1). In that case one of several co-sharers entered into the possession of a plot on the death of a tenant. The other co-sharers sued him and obtained a decree for joint possession and mesne profits. A Bench of this Court set that decree aside, holding that they were entitled only to a declaration that they were joint owners entitled to receive their share of profits. That decision was passed before the present Code came into force. In *Jagarnath Ojha* v. *Ram Phal* (2) it was held that "a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession, whether the plaintiff was originally in joint possession and was subsequently dispossessed or whether he had never been in possession." It was there stated, at page 154 —"That a decree for joint possession can be made has until recently in this Court always been regarded as settled law, but if any doubt existed on the point, it has been removed by the clear provisions of order XXI, rule 35, of the present Civil Procedure Code." The same Bench which decided the appeal in *Jagar Nath Singh* v. *Jai Nath Singh* (1) arrived at a similar conclusion in 1905 in *Phani Singh* v. *Nawab Singh* (3). The decision in *Jagarnath Ojha* v. *Ram Phal* (2) differs distinctly from the decision in *Phani Singh* v. *Nawab Singh*.

With regard to the question of mesne profits, there is a Full Bench ruling in *Bhairon Rai* v. *Saran Rai* (4) that a relief for mesne profits can be added to a decree for joint possession.

I am unable to see that the alteration in the Code of Civil Procedure is sufficient to reconcile the conflicting decisions in

(1) (1904) I. L. R., 27 All., 88. (3) (1904) I. L. R., 26 All., 588.

(2) (1911) I. L. R., 34 All., 150. (4) (1905) I. L. R., 28 All., 161.

Jagarnath Ojha v. *Ram Phal* (1) and *Phani Singh* v. *Nawab Singh* (2), and as a single Judge I am unable to decide a point upon which two Benches have disagreed. I refer the decision of this appeal to a divisional Bench. It will be for them to consider whether it should be referred to a Full Bench.

Pandit *Lakshmi Narain Tiwari* and Munshi *Haribans Sahai*, for the appellant.

Munshi *Iswar Saran*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in this appeal relates to certain plots of land, situated in the village Nemi Amna, Pargana Sylhet. The plaintiffs are some of the co-sharers of that village. The defendants are also co-sharers in the same village.

In the year 1898, the said village was partitioned by the Government and lots were prepared by virtue of which the plots in dispute were allotted to the mahal to which the predecessors in title of both the parties belonged. The allegation of the plaintiffs was that after the said partition the plots in question had been in the joint *khudkasht* cultivation of the predecessors of the parties, and that the predecessors in title of the plaintiffs and the defendants jointly cultivated the said plots till 1318 Fasli. It was also stated that after the said year a person named Thagai was put in cultivatory possession of the said plots on behalf of the above parties ; that he continued in cultivation till 1321 Fasli, and that the plaintiffs thereafter resumed possession. The plaintiffs further said that after Thagai had surrendered his possession, the plaintiffs cultivated the disputed land, and that the defendants wrongfully cut the crops standing thereon. They, therefore, sued for possession of the said plots and damages.

The defendants denied that the disputed plots were the *khudkasht* land of the plaintiffs. They said that the land in question had been in the exclusive possession of the defendants ; that Thagai was their tenant and had a right to surrender possession to them and that the plaintiffs were not entitled either to a decree for possession or to damages.

The trial court found that the land in dispute was the joint *khudkasht* of Sital Singh, the predecessor in title of

(1) (1911) I. L. R., 34 All., 150. (2) (1905) I. L. R., 28 All., 161.

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the defendants, and the present plaintiff; that it was under the cultivation of Thagai on behalf of both, and that the plaintiffs were not entitled to possession or damages. The claim for possession and damages was accordingly dismissed. On appeal that decree was upheld. The lower appellate court similarly came to the conclusion that the parties had a right to cultivate the disputed land and that the possession of Thagai was on behalf of the plaintiffs and the predecessors in title of the defendants.

It is urged on behalf of the plaintiffs appellants that they were entitled to a decree for joint possession, inasmuch as, according to the courts below, the disputed land was in the joint cultivation of the predecessors of both the the parties till 1318 Fasli, and that Thagai was in possession subsequently on behalf of them. The decisions on which the plaintiffs rely in support of their contention have been considered by us in another case, *Bisheshar Singh* v. *Hanuman Singh* (1), which was referred to a Bench along with this case, and we are of opinion that on the findings arrived at the plaintiffs are entitled to a decree for joint possession, because they had been in actual physical possession of the plots till 1318 Fasli and Thagai was thereafter cultivating the said *khudkasht* land on behalf of both the parties.

As pointed out by their Lordships in the case of *Watson and Co.* v. *Ramchund Dutt* (2), no co-sharer, who has been in physical or actual possession of any part of the joint land, is liable to be ejected by any of the other co-sharers in the village except by means of a partition lawfully obtained in a separate proceeding. Every co-sharer has a right to the beneficial enjoyment of the joint land so long as he does not thereby disturb the actual physical possession held by another co-sharer from before, but where another co-sharer is in such possession, he can only get symbolical possession of the nature referred to in order XXI, rule 35, of the Code of Civil Procedure. The plaintiffs and their predecessors in title have been in actual possession of the disputed land jointly with the defendants by holding the same as their *khudkasht* for some years and letting it out to Thagai afterwards. The defendants had no right to oust them from the land when Thagai

(1) (1931) *Supra* p. 1.

(2) (1880) I. L. R., 13 Calc., 10.

surrendered it, and they are entitled to a decree for joint possession in addition to a decree declaring their joint rights which the courts below have granted. The claim to profits by way of damages cannot be entertained, for such profits can be taken into consideration when the annual accounts of the village income are adjusted.

The appeal is, therefore, allowed and the decree of the courts below is modified in so far as we allow a decree for joint possession to the plaintiffs of the disputed land, in addition to the reliefs granted by the courts below. The parties will bear their own costs in this Court.

Decree modified.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

ANANDI PRASAD DUBE (DEFENDANT) v. KRISHNA CHANDRA MUKERJI (PLAINTIFF) AND RAM KUMAR SINGH AND OTHERS (DEFENDANTS.)*

Mortgage—Prior and subsequent mortgagees—Purchaser of mortgaged property who has paid off the earlier mortgages, but not the later ones—His position as regards a subsequent mortgagee's suit for sale—Interest.

When a purchaser of mortgaged property who has obtained possession and paid off prior mortgages sets up in defence to the suit of a subsequent mortgagee the prior mortgages which he has discharged, he is entitled to be recouped the amount which he paid for redemption of the prior mortgages as from the date when it was paid; but he is not entitled to get interest thereon after the date of his entering into possession of the property. *Sri Ram* v. *Kesri Mal* (1) followed.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *B. E. O'Conor* and Mr. *Shamnath Mushran*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

TUDBALL and SULAIMAN, JJ.:—This is a defendant's appeal arising out of a mortgage suit. The mortgaged property is a residential house in Allahabad. The original owner, on the 10th of May, 1907, mortgaged it to Dr. Banerji for the sum of Rs. 7,000. On the 1st of February, 1911, he mortgaged it for the sum of Rs. 1,000 to one Badri Prasad. On the 16th of February, 1911, he mortgaged it for the sum of Rs. 6,000 to

*First Appeal No. 64 of 1919, from a decree of Partab Singh, Subordinate Judge of Allahabad, dated the 31st of July, 1918.

(1) (1903) I. L. R., 26 All., 135.

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AMARDI PRASAD DUBE v. KRISHNA CHANDRA MUKERJI.

Krishna Chandra Mukerji. On the 19th of June, 1911, he mortgaged it for the sum of Rs. 3,000 to Ganga Prasad. All four mortgages were simple. The present appellant before us purchased the property from the original mortgagor on the 20th of September, 1911 for the sum of Rs. 14,000. The vendor left in the appellant's hands Rs. 8,500 to pay off the first mortgage; Rs. 1,100 to pay off the second mortgage; Rs. 1,500 towards payment of the third mortgage, and Rs. 500 towards payment of the fourth mortgage. The appellant paid off the first two mortgages. That of Dr. Banerji was paid off on the 9th of June, 1912, and that of Badri Prasad on the 26th of November, 1911. The total sum actually paid for the first two mortgages was Rs. 9,091-11-6. The fourth mortgagee Ganga Prasad brought a suit on the basis of his mortgage and he got a decree for recovery of his money conditional on his paying off the prior mortgages. He apparently thought the property was not of sufficient value, so he did not prosecute his case any further and the fourth mortgage has thus died out. In that suit the present appellant took his stand upon the first two mortgages which he had paid off, and claimed to be redeemed before the property could be sold. Then the suit was instituted, out of which the present appeal has arisen, by the third mortgagee. The appellant again took his stand on the first two mortgages and claimed that he was entitled to be paid off before the property could be sold. The court below has held in his favour on issue No. 3 in the judgment, but a question of interest arose. The appellant, the purchaser from the original mortgagor, of course, has been in possession of the property all along, still he claimed that interest on the first two mortgages should be paid to him *at least up to the date of suit*. The court below remarked as follows:—"I do not think he should get interest up to the date of suit, for he has been in possession since his purchase and so enjoyed the usufruct of the property. He cannot have both the usufruct and the interest."

It held that the sum payable to the appellant was Rs. 9,091-11-6. This included interest on the dates of payment of the prior mortgages, that is, the 26th of November, 1911, and the 9th of June, 1912.

The appellant has come here on appeal and it is urged on his behalf that he is in justice and equity entitled to have interest on his money paid on the above two dates, not only up to those dates, but up to the date of suit. The point is one which is covered by at least three decisions of this Court. The earliest is that of *Sri Ram* v. *Kesri Mal* (1), where the point was actually raised and discussed and decided. There, a subsequent mortgagee was seeking to bring to sale the property mortgaged to him. There were defendants to the suit who had purchased the property and had paid off the prior mortgages. It was held that the plaintiff was not entitled to an order absolute for sale without paying not merely the amount which the defendants had paid in respect of the prior mortgages but the full amount due on such mortgages. It was further held that, where such defendants had obtained possession of the mortgaged property, having had the usufruct, they were not entitled to interest after the date of such possession. We quote the following from this judgment:—

"We, however, think that since the appellants have from the date of their purchase been in possession of the mortgaged property, it must be deemed that the usufruct was appropriated as an equivalent for interest upon the money paid by them. Every person who purchases property for a certain value is presumed to pay such value as would yield to him a sufficient return for the money invested by him in the property. Therefore when the appellants purchased the mortgaged property, and as consideration thereof discharged the prior mortgages, it is reasonable to assume that since the date of the payment of the consideration they received as an equivalent for the interest of the money paid the usufruct of the property. This inference is strengthened by the fact that in their defence in the suit the appellants did not in distinct terms claim interest upon the money which they had paid in liquidation of the prior mortgages. Supposing the mortgage of Makhan Lal, instead of stipulating for cash payment by way of interest, had provided that he should enjoy the usufruct as the equivalent of interest, then the moment the mortgage was discharged by payment the

(1) (1906) I. L. R., 28 All., 185.

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purchaser would himself enter into usufructuary possession. Could it be contended then in answer to a suit for sale by a puisne incumbrancer that the purchaser could use as a shield not only the sum he had paid to discharge the mortgage but also the value of the usufruct which he had appropriated after such discharge? In other words, he would be entitled to enjoy the usufruct and also obtain from the later mortgagee the value of it. The proposition seems to be founded upon no legal or equitable consideration."

The judgment referred to two cases, one of *Dip Narain Singh* v. *Hira Singh* (1) and the other, *The Delhi and London Bank, Limited*, v. *Bhikari Das* (2). The point was not really decided in either of these two cases, but they were both instances in which interest was not allowed for any period subsequent to the date of possession of the purchaser. This same rule was adopted in the case of *Mati-ullah Khan* v. *Banwari Lal* (3). It will be noticed that two issues were remitted by this Court for decision by the court below. One was, "what amount, if any, is due on each of the mortgages held by Bhola Nath, dated respectively the 18th of August, 1894, 11th of December, 1894, and the 14th of September, 1895?". The decision of this Court on the return of the issue has not been published, but we have before us the record of the case and we quote from that judgment also to show that the same rule was adopted as in the case reported in I. L. R., 26 Allahabad. The judgment runs as follows:—

"We accordingly referred to the court below issues as to the amount due on foot of these earlier mortgages and as to the bar of limitation. The court has found that none of these mortgages were time-barred and has estimated the amount due with interest on foot of them, in the alternative, up to the 13th of January, 1910, and the 23rd of April, 1910. Objection has been taken to these findings on the ground that interest ought only to have been calculated up to the date when the mortgages were paid off, namely, the 28th of September, 1901. We are of opinion that interest is chargeable up to the last mentioned date

(1) (1897) I. L. R., 19 All., 527 (2) (1901) I. L. R., 24 All., 185.
(3) (1909) I. L. R., 32 All., 133.

and not beyond. An account has accordingly been prepared, which has been accepted by the parties, and by it it is found that the sum due on foot of these mortgages with interest up to the 28th of September, 1901, amounts to Rs. 3,122-5-6."

In First Appeal No. 376 of 1911 the same point arose and the decision in the case of *Sri Ram* v. *Kesri Mal* (1) was again followed. In our opinion this case is on all fours with that of *Sri Ram* v. *Kesri Mal* (1). We think the proper and the simplest method of settling the equities between the parties is to hold that the prior mortgagee having had possession of the property is not entitled to interest after the date of possession, and we hold accordingly.

We have not been able to find any decision which conflicts in any way with the above-mentioned three cases. The facts in the present case are similar to those in the cases mentioned above and we can no see reason to differ from the rule adopted therein. According to that rule the appellant was entitled to interest up to the date on which he paid off the prior mortgages and the lower court has allowed him that interest.

It must be noticed that the respondents have not challenged the defendant's right to stand upon his prior mortgages in spite of the fact that money was left with the appellant for payment of all the four mortgages. The appeal fails and is dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball.

BHADUL PANDE AND OTHERS (DEFENDANTS) *v.* MANNI PANDE AND OTHERS (PLAINTIFFS).*

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July, 2.

Act No. VII of 1870 *(Court Fees Act), section 4—Letters Patent Appeal from decision of single Judge—Court fee.*

Held that no court fee is leviable on an appeal under section 10 of the Letters Patent of the Allahabad High Court from the judgment of a single Judge of the Court.

THIS was a reference to the Taxing Judge of the Court under the Court Fees Act, 1870, the question being whether any court

* Stamp Reference in Appeal No. 71 of 1921, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 29 All., 185.

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fee is payable on a memorandum of appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court.

Munshi *Bhagwati Shankar* (for Munshi *Narain Prasad Ashthana*), for the appellants.

The Government Advocate (Babu *Lalit Mohan Banerji*), for the Crown.

OFFICE REPORT.—"No court fee stamp has been paid in this appeal. Under section 4 of the Court Fees Act (VII of 1870) it must bear proper court-fee stamps which in this case will be Rs. 10, as originally paid in this Court.

It is in time up to this day. 21-4-1921.

After writing the above report the learned counsel has affixed Rs. 2 stamp. Therefore this appeal is deficiently stamped by Rs. 8."

COUNSEL'S OBJECTION.—"So far the practice has, no doubt, been to pay *ad valorem* court fees on the memorandum of appeals, under section 10 of the Letters Patent, against the judgment of a single Judge of the High Court. But such a practice does not appear to be warranted by law. The only section of the Court Fees Act under which the Court Fees can be claimed on the documents filed in the High Court is section 4 of that Act. That section lays down that all documents filed in any case coming before the High Court—

(1) in exercise of original civil jurisdiction, or (2) in exercise of original criminal jurisdiction, or (3) in exercise of jurisdiction as regards appeals from the judgment of two or more Judges or of a Division Court, or (4) in exercise of its appellate jurisdiction over subordinate courts, or (5) in exercise of its jurisdiction as a court of reference or revision must bear proper court fee stamps as required by that Act.

A single Judge sitting alone is not a Division Court, which is explained by section 13 of the High Courts Act of 1861 and by the Government of India Act, section 108, as a court consisting of two or more Judges. A High Court Judge exercising powers of an appellate court in second appeals as a High Court cannot be said to be a court subordinate to the High Court or under its superintendence; (vide section 107 of the Government of

India Act, and section 10 of the Letters Patent, Allahabad High Court). Therefore a memorandum of appeal in a Letters Patent Appeal against the judgment of a single Judge is not a document contemplated by section 4 of the Court Fees Act and consequently no court fees can be levied thereon.

A court fee stamp of Rs. 2 has been affixed as on an application."

OFFICE REPORT TO TAXING OFFICER.—"Munshi *Narain Prasad Ashthana* being under the impression that under the law no court fee is payable on Letters Patent appeals has filed this appeal apparently as a test case and his written objection, dated the 3rd of May, 1921, contests the correctness of my deficiency report on the 21st of April, 1921. My submission is as under:—

1. Section 4 of the Court Fees Act provides that no document of any of the kinds specified in the first or second schedule annexed to this Act as chargeable with fees shall be filed . . . in the exercise of its jurisdiction as regards appeals from the judgment of two or more Judges of the said Court or of a Division Court . . . unless in respect of such document there be paid a fee of an amount not less than that indicatedby either of the said schedules as the proper fee for such document.

Under article 1, schedule 1, of the Court Fees Act every plaint and every memorandum of appeal is to be stamped with a court fee according to the valuation given by the plaintiff or the appellant. The question whether an appeal is allowed from the decision of a single Judge of the High Court, is a different matter; but as it falls within the category of appeals it has to be stamped accordingly. Thus a Letters Patent Appeal stands exactly on the same footing as any other appeal and requires an *ad valorem* court fee

2. The words "Division Court" used in section 4 in contradistinction to "the judgment of two or more Judges of the said court" clearly indicate a court presided over by a single Judge. They appear to have been used to indicate a Court which is not presided over by two or more Judges or by all the Judges of the Court.

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The words "the judgment of two or more Judges of the said Court or of a Division Court" seem to cover the whole ground. To be more plain, there are three possible cases:—

(a) The Court may be presided over by all the Judges. In such a case there is no appeal provided anywhere to the High Court.

(b) The Court may be presided over by two or more Judges. In such a case, under certain conditions, a Letters Patent Appeal is provided.

(c) The Court may be presided over by a single Judge. In such a case an appeal is universally provided under the Letters Patent.

From this consideration it fully appears that the particular clause of section 4, quoted above, is meant to cover Letters Patent Appeals, which must bear an *ad valorem* court fee like other appeals.

3. It has been the practice in this High Court, so far as I have been able to ascertain, from its very inception that Letters Patent appeals always bear an *ad valorem* court fee.

This practice has never been disturbed so far as I am aware. The words "Division Court" in section 4 seem to have always been taken to mean a court presided over by a single Judge of this Court. Otherwise there seems to have been no other justification for such a long established practice. It will be extraordinary if the sense in which these words have so long been acted upon is to be disturbed.

4. So far as appeals against judgments of two or more Judges are concerned they are clearly provided under section 4 and they must bear an *ad valorem* court fee. These appeals are preferred under the Letters Patent, section 10. It does not stand to reason that appeals which are preferred against the judgment of a single Judge, which are also preferred under the same section of the Letters Patent, should bear no stamp and should be treated differently from the former."

TAXING OFFICER'S REPORT:—"This is a matter of such importance that we require an authoritative ruling on the subject, and I must refer it for the decision of the Taxing Judge."

The following decision was delivered by—

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TUDBALL, J.:—This is a reference made by the Taxing Officer to me as Taxing Judge under section 10 of the Court Fees Act. The matter is one of some importance in that it affects a practice of this Court which has been regularly observed for many years.

A second appeal was filed in this Court, which under the rules in force was triable by a single Judge of the Court. The defendants were the appellants and the appeal was dismissed by MR. Justice RAFIQ sitting alone. Under section 10 of the Letters Patent an appeal has now been filed against the judgment of the single Judge and the question is whether or not this petition of appeal must bear a court fee stamp upon it. In the past, court fees have regularly been levied on such appeals from judgments of single Judges of this Court. Chapter 2 of the Court Fees Act is that portion of the Act which relates to fees in High Courts and in Court of Small Causes at the Presidency towns. Section 4 is the only section which lays down in what circumstances court fees must be levied in High Courts. It says:—"No document of any of the kinds specified in the first or second schedules of the Act as chargeable with fees shall be filed, exhibited or recorded in, or shall be received or furnished by, any High Court in any case coming before such court, *firstly*, in the exercise of its extraordinary original civil jurisdiction: *secondly*, in the exercise of its extraordinary original criminal jurisdiction; *thirdly, in the exercise of its jurisdiction as regards appeals from the judgment of two or more Judges of the said court or of a division court; fourthly*, in the exercise of its jurisdiction as regards appeals from the courts subject to its superintendence; *fifthly*, in the exercise of its jurisdiction as a court of reference or of revision, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

It is quite clear that the present petition of appeal comes before this Court in the exercise of its jurisdiction as regards an appeal from a judgment of a single Judge. Section 4 nowhere mentions this jurisdiction as one of those in the case of which court fees have to be levied in accordance with schedules 1 and 2 of the Act. Where the Court is exercising its jurisdiction as

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regards appeals from the judgment of *two* or more Judges, it is clear that the court fee must be levied according to the abovementioned schedules, or where the Court is exercising its jurisdiction as regards an appeal from a Division Court. In this High Court at present there is no such thing as a Division Court. Section 27 of the Letters Patent lays down :—

"Any function which may be performed by this High Court in the exercise of its appellate jurisdiction may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose in pursuance of section 108 of the Government of India Act of 1915."

Section 108 lays down :—

"That each High Court may by its own rules provide, as it thinks fit, for the exercise by one or more Judges or *by Division Courts constituted by two or more Judges* of the High Court, of the original and appellate jurisdiction vested in the Court."

So far as I am aware no Division Courts have ever been constituted in this High Court. It is quite clear, therefore, that the present case is not covered by section 4 of the Court Fees Act. There being therefore no law under which this Court is bound to levy court fees in the present instance, the petition of appeal must be received without any court fee whatsoever. It is difficult to say why the present class of case has not been considered in section 4 of the Court Fees Act. It may be that the word "two" in the clause which governs appeals under the Letters Patent was in error written for "one." If that clause ran as follows:—

"Or in the exercise of its jurisdiction as regards appeals from the judgment of one or more Judges of the said Court or of a Division Court"—the clause would cover the present case. But for some reason unknown to me the word "two" has been used, and the Act does not cover the case of an appeal from the judgment of a single Judge under Letters Patent, unless that single Judge constitutes a Division Court; though it seems to be that under section 108 of the Government of India Act a Division Court cannot under that section consist of less than two Judges. I, therefore, hold that no court fees are leviable on the present petition of appeal.

FULL BENCH.

1921
July, 19.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Tudball and Mr. Justice Sulaiman.

KESHO PRASAD SINGH (DEFENDANT) v. SHEO PARGASH OJHA AND OTHERS (PLAINTIFFS).*

Res judicata—*Civil Procedure Code* (1908), *section* 11, *explanation* VI—*Hindu law—Reversioners—Alienation by widow—Effect of suit by nearest presumptive reversioner during the widow's life-time on subsequent suit after widow's death between actual reversioner and the alienee.*

A suit by a reversioner for setting aside an alienation made by a Hindu widow in possession is brought by him in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate. A decree in such a suit is therefore binding, not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. This is so, not because one reversioner must in that case be deemed to claim through another, but because the reversioner who sues represents the others and explanation VI to section 11 of the Code of Civil Procedure comes into operation. *Chhiddu Singh* v. *Durga Dei* (1) and *Darbari Lal* v. *Gobind Ram* (2) overruled. *Venkatanarayana Pillai* v. *Subbammal* (3), *Janaki Ammal* v. *Narayanasami Aiyar* (4) *Varamma* v. *Gopaladasayya* (5) and *Bhagwanta* v. *Sukhi* (6) referred to.

THE facts of this case are very fully set forth in the judgment of TUDBALL, J.

The case was referred to a Full Bench, by the following order :—

TUDBALL and SULAIMAN, JJ. : —This appeal raises a question of law of considerable importance. It is a question which in the past has been decided by this Court in one way, but in view of the decision in *Venkatanarayana Pillai* v. *Subbammal*, (3) and also in view of the decision in *Varamma* v. *Gopaladasayya* (5) of the Full Bench of the Madras High Court it seems to us that the matter should be reconsidered and the old ruling either affirmed or set aside. Without

* First Appeal No. 17 of 1919, from a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 3rd of September, 1918.

(1) (1900) I. L. R., 22 All., 332. (4) (1916) I. L. R., 39 Mad , 884.
(2) (1921) I. L. R., 43 All., 514. (5) (1918) I. L. R , 41 Mad , 659.
(3) (1915) I. L. R., 38 Mad., 406. (6) (1899) I. L. R., 22 All., 88.

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that the alienation is not binding on the estate, for the very same reason, unless the decision in the matter is binding and operates as *res judicata* between the whole reversionary body and the opposite party. The point is of considerable importance, for this class of cases is very frequent in these provinces. We think that the matter should be decided by a larger Bench and we therefore refer this case to the Hon'ble the Chief Justice for orders in order that it may be decided by a larger Bench.

The appeal was thereupon referred to a Bench consisting of Justice Sir PRAMADA CHARAN BANERJI, Mr. Justice TUDBALL and Mr. Justice SULAIMAN.

Munshi *Haribans Sahai*, for the appellant.

Pandit *Uma Shankar Bajpai* and Babu *Piari Lal Banerji*, for the respondents.

The following judgments were delivered.

BANERJI, J. :—I have had the advantage of reading the judgment prepared by my brother TUDBALL and I fully agree with it. There is nothing which I may profitably add without repeating what he has said.

Having regard to the recent pronouncements of their Lordships of the Privy Council which my learned colleague has quoted at length, it must be held that a suit by a reversioner for setting aside an alienation made by a Hindu widow in possession is brought by him in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate. A decree in such a suit is, therefore, binding, not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. This is so, not because one reversioner must in that case be deemed to claim through another, but because the reversioner who sues represents the others and Explanation VI of section 11 of the Code of Civil Procedure comes into operation. In the Full Bench case of *Bhagwanta* v. *Sukhi* (1) all that was held was that one reversioner did not claim through another. There [are,

(1) (1899) I. L. R., 22 All., 33.

no doubt, certain observations of the learned Chief Justice in his judgment in that case which are favourable to the appellant, but they cannot be followed in view of the opinion recently expressed by their Lordships of the Privy Council. The whole question has been fully discussed by my learned colleague and all that I need say is that I agree with him. In these circumstances we must dissent from the decisions in which a contrary view has been held and must rule that it is not open to the appellant to dispute the correctness of the decision in the former case and to show that the mortgage made by the widow was for valid necessity.

Speaking for myself, I am inclined to hold that the sale which took place at the instance of Kishan Prasad was a sale of the rights and interests of the widow such as they were declared to be in the suit of the reversioners decreed before the sale. No doubt the property was described to be the share of the husband held by the widow, but as before the sale it was held, as between Kishan Prasad and the reversioners, that the mortgage by the lady could not enure beyond her life, and as the property was put up for sale in enforcement of the mortgage after the decree, the mortgagee must be deemed to have caused only the life-interest of the widow to be sold. If this view is correct, the interests acquired by the purchaser at the auction sale came to an end with the death of the window and the appellant has no longer any right in the property. From either point of view, therefore, the appeal must fail in regard to the zamindari property in dispute.

As for the grove in dispute, it is impossible to hold that section 79 of the Tenancy Act applies to it.

I also would dismiss the appeal.

TUDBALL, J.:—This appeal arises out of a suit brought by the three plaintiffs respondents as the reversioners of one Ram Manohar Ojha, to recover possession of his estate from the various persons to whom his widow Musammat Audha Kunwar transferred or who took possession thereof after her death. The defendants have separately appealed in respect of those properties which are in their separate possession. The appeal

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No. 439 of 1918 has been settled and has been dismissed, but without costs.

The present appellant is the owner of the Dumraon Raj. The other appellant, Musammat Dharchana Kunwar, is the widow of one Babu Kishan Prasad, alias Kishan Ram. Ram Manohar Ojha died about the year 1856 leaving three childless widows and an estate. The two of the widows died leaving Musammat Audha Kunwar in sole possession. The estate consisted of zamindari in four villages, including a 2 anna 8 pie share in village Pachrokia, a grove No. 526 in mauza Balihar, some *muafi* and fixed rate tenancies in another village and an occupancy holding in the district of Arrah.

The zamindari was subject to alluvion and diluvion and it was held under permanent settlement.

The widow appears to have soon commenced to alienate the estate and her husband's reversioners started litigation in respect thereto in 1883, with which, however, we are not concerned in this appeal. She fell in arrears with her Government revenue, and as the Raja of Dumraon was a co-sharer and liable jointly therefor to Government, it was recovered from him. On the 18th of May, 1893, he sued her in the Revenue Court to recover what he had paid and obtained a simple money decree for Rs. 505-5-4 on the 29th of January, 1894. In execution of his decree a portion of the estate was attached and advertised for sale. Dhanai Ojha, the presumptive reversioner, intervened to save the property. He petitioned the Collector and asked to be granted a lease for 12 years, offering to pay off the decree and to furnish security. The Collector approved, but Musammat Audha Kunwar did not agree. Accordingly, on the 25th of December, 1899, she borrowed Rs. 1,000 from Kishan Prasad and mortgaged the estate to him. Out of this sum she paid Rs. 587 to satisfy the Raja's decree. There is no evidence to show what necessity if any, there was for borrowing the balance of the Rs. 1,000. As this debt was not paid, Kishan Prasad sued and obtained a decree for sale on the basis of the mortgage on the 31st of March, 1903. Thereupon Dhanai Ojha, the presumptive reversioner, at once sued for a declaration that the alienation by the widow was without legal necessity and that neither it nor the decree

obtained thereon by Kishan Prasad could affect the estate otherwise than for the life-time of the widow or was binding on the reversionary body.

A decree was passed in his favour to this effect on the 21st of June, 1904, as against the widow and Kishan Prasad. On the 16th of November, 1904, the estate was sold at auction in execution of the mortgage decree and purchased by Kishan Prasad himself. He entered into possession. *The grove* No 526 *in mauza Balihar was not included in this sale.* It was situated in a village of which the Raja of Dumraon is the zamindar. Subsequently Kishan Prasad also failed to pay his Government revenue. The arrears were recovered from the Dumraon Raj as before. A suit for these was brought against him and a decree obtained in execution of which the 2 annas 8 pies share of Pachrokia was attached and sold and purchased by the Raja in 1912. Musammat Audha Kunwar died on the 9th of September, 1914. The Raja of Dumraon thereupon unlawfully took possession of grove No. 526 in mauza Balihar. The present suit was instituted in September, 1917, by the three respondents as the next reversioners entitled to the estate on the death of the widow. Various defences were raised by the two defendants, but in this and the connected appeal we are concerned with only two of these.

(1) The two defendants pleaded that the transfer by the widow was for legal necessity and was therefore binding on the estate.

(2) In respect to grove No. 526, the Raja of Dumraon pleaded that he was the zamindar of Balihar; that the grove was a holding within the meaning of the Tenancy Act; that he had taken adverse possession of it on the death of the widow, and a suit for possession of it would lie only under section 79 of the Tenancy Act, for which the period of limitation was only six months; that no suit could lie in the Civil Court, and moreover, was barred by limitation, having been brought in 1917.

The court below held on both these points in favour of the plaintiffs and granted a decree for possession of the grove No. 526 and the share in mauza Pachrokia and Rs. 25 mesne profits as against the Maharaja Kesho Prasad Singh, and for the other

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It seems that it is the portion italicized that the Bench of this Court took to be a strong expression of opinion. We cannot agree that their Lordships intended to say or did say any more than that the decision, *even if it was not binding as res judicata*, would be so strong an authority in point as probably to deter either party from disputing it. They nowhere expressed a strong opinion that it would not be binding as *res judicata*, between the widow and a new reversioner. The decision in *Okhiddu Singh* v. *Durga Dei* (1) entirely overlooked the capacity in which a presumptive reversioner sues in such a case as the present one. There are four kinds of suits which a presumptive reversioner might bring against a widow and others:

(1) For a declaration that he himself is the presumptive reversioner.

(2) For a declaration that an adoption is invalid.

(3) For a declaration that an alienation is not binding on the reversioners and cannot endure beyond the life time of the widow.

(4) To restrain the widow from wasting and damaging the estate.

The first class would clearly be one brought in a purely personal capacity and such a declaration has always been refused as being futile because no one can predicate that the plaintiff will be the actual reversioner when the estate actually opens out.

In the second class it has been held, *vide Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (2) that the presumptive reversioner represents the remote reversioner, provided the matter is decided after a fair trial, and that the same principle applies when a remote reversioner is allowed to sue under special circumstances to set aside an adoption and *that the true purpose of the concession of a right of suit in these cases is the protection of the interests of the person or persons who may eventually turn out to be the heir or heirs.* In the case of *Venkatanarayana Pillai* v. *Subbammal* (3) their Lordships of the Privy Council concurred in the opinion of the Madras High Court that the

(1) (1900) I. L. R., 22 All, 382. (2) (1906) I. L. R., 29 Mad, 390.

(3) (1915) I. L. R., 38 Mad, 406.

presumptive reversioner's suit in such a case is in a representative capacity. In this class of cases, therefore, the decision has been held to be binding as between the actual reversioner at the death of the widow and the adopted son or any one claiming through him.

In the case of the third class of suit, however, the Madras High Court, until the decision in the Full Bench case of *Varamma* v. *Gopaladasayya* (1), had sometimes drawn a distinction between this class and the second class (to set aside an adoption), but in a Full Bench case that Court has altered its view in the light of the decisions of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (2) and *Janaki Ammal* v. *Narayanasami Aiyer* (3). It has now held that in this class of case also the presumptive reversioner's suit is a representative suit on behalf of all the reversioners. It seems to us obvious that such a suit, if genuine and properly fought out, is one the true purpose of which is the protection of the interests of the person or persons who may eventually turn out to be the heir or heirs, and that the position of the plaintiff in both these two classes of suits is exactly the same.

Similarly, in the fourth class of suit to restrain waste, the plaintiff reversioner brings his suit in a representative capacity to protect the interests of all the reversioners and also those of the person or persons who may eventually turn out to be the actual heir or heirs. In the case of *Venkatanarayana Pillai* v. *Subbammal* (2) their Lordships of the Privy Council remark as follows:—

"The Indian law, however, permits the institution of suits in the life-time of the female owner for a declaration that an adoption made by her is invalid or an alienation effected by her is not binding against the inheritance."

They then point to the difference in the language of articles 118 and 125, schedule I, of the Limitation Act as to who may institute the suit in each class of case, and then continue:—"But it does not follow from these words (of article 125) that the suit brought in the latter case by the nearest reversioner is *for his*

(1) (1918) I. L. R., 41 Mad., 659. (2) (1915) I. L. R., 38 Mad., 408.
(3), (1916) I. L. R., 39 Mad., 634.

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personal benefit for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike "

They then point out the distinction between the two classes of suit and remark :—

" But in both the right to sue is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights . . . Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits the position of the plaintiffs in both instances when closely examined will be found, *so far as the point for decision is concerned*, to be the same, "

We do not lose slight of the fact that in the case the point for decision was whether the next reversioner was entitled, on the death of the presumptive reversioner, to carry on the suit instituted by the latter, but their Lordships clearly state that, apart from the question whether the next presumable heir is the legal representative of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

In the case of *Janaki Ammal* v. *Narayanasami Aiyer* (1) a presumptive reversioner sued to restrain the widow from wasting the estate and for any further relief which the court might deem fit to give in the case. The Courts in India held that waste had not been established. Before the Privy Council it was urged that he was entitled to a declaration that he was the next presumptive heir, because his claim to be such had been disputed. It was held that in the circumstances, he having failed to make good the main heads of his complaint, no such declaration ought to be granted to him. This claim for this declaration was clearly a personal claim, whereas the suit to restrain waste had really been brought in a representative capacity. Their Lordships remarked as follows :—

" It is also true that a reversionary heir . . . is recognized by a Court of Law as having a right to demand that the

(1) (1916) I. L. R., 39 Mad., 634.

estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life. But a reversionary heir thus appealing to the court truly for the conservation and just administration of the property does so in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion. The law on this subject was recently expounded in the judgment of this Board delivered by Mr. AMEER ALI in *Venkatanarayana Pillai* v. *Subbammal* (1). This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir on one individual. The latter operation attempted during the enjoyment of the life estate would necessarily be premature and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the person to whom as reversionary heir it shall ultimately and at the proper time be determined that the estate shall go."

We have quoted at length from these two decisions because it seems to us clear that, according to these remarks, in a suit like the one now before us, the former suit was clearly one brought by the presumptive reversioner in his representative capacity and not in his personal capacity, and the decision therein, if obtained after fair contest and in the absence of fraud and collusion, must be binding as between the widow and her alienee on the one side and the whole reversionary body on the other. If it were not so binding it surely would be futile to grant any such declaration as is sought, for no one can predicate that the plaintiff reversioner will be the actual reversioner when the widow dies. Such a suit is clearly brought in a representative capacity in order to keep intact the estate for the persons to whom as reversioners it will ultimately go on the death of the widow. *The right claimed by the presumptive reversioner is a right to demand that the estate be kept intact and free from danger during its enjoyment by the widow.* It is a right claimed in common for himself and all the members of the reversionary body. If he colludes with the widow that right may be enforced by the next reversioner after him. If he dies during

(1) (1915) I. L. R., 38 Mad., 406.

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the prosecution of his suit his place as plaintiff may be taken by the same next reversioner. Explanation VI of section 11 of the Code of Civil Procedure clearly lays down that where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall "*for the purposes of this section* be deemed to claim under the persons so litigating."

In the present case, therefore, *for the purpose of section 11 of the Code* the present plaintiffs must be deemed to claim under Dhanni Ojha. It will be noted that this is so deemed only for the purposes of this section and this does not necessarily conflict with the decision in *Bhagwanta* v. *Sukhi* (1) that the actual reversioner on the death of the widow inherits from the last male owner. It is only where such a declaratory suit has been brought by the presumptive reversioner *in his representative capacity*, claiming the right which he has in common with every other reversioner,' that this rule laid down in Explanation VI of the section applies.

In view, therefore, of the pronouncements of their Lordships of the Privy Council as to the nature of such suits and the capacity in which the plaintiffs therein sue, the logical conclusion at which the Court must arrive is that a former decision, whichever way it may be, is binding as between the transferee and the actual reversioner when the widow dies, provided that the matter has been fully and genuinely contested. Our attention has been called to the decision of a Bench of this Court in *Darbari Lal* v. *Govind Ram* (2) which has adhered to the decision in *Chhiddu Singh* v. *Durga Dei* (3). This decision does not recommend itself to us. We do not think that sufficient attention has been paid therein to the Privy Council rulings to which we have referred. Here also we note that in Bombay the representative character of the reversioner's suit has all along been recognized. The appellant has acquired at auction the right, title and interest of Kishan Prasad in the share in mauza Pachrokia, which he put to sale in execution of his decree against his judgment-debtor. In view of the decision of the 21st of June,

(1) (1899) I. L. R., 22 All., 89. (2) (1921) I. L. R., 43 All., 514.
(3) (1900) I. L. R., 22 All., 382.

1904, Kishan Prasad's rights came to an end on the death of Musammat Audha Kunwar and the plaintiffs are entitled to recover possession.

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There remains the question of grove No. 576. The appellant pleads that a suit for possession of this can only lie in the Revenue Court and ought even there to have been brought within six months, as he took possession of it on the death of the widow. He is, he says, the zamindar, and the plaintiffs were agricultural tenants whom he has illegally ousted. It is pointed out that the grove-holder, as the settlement records show, used to deliver half the produce of the grove as rent. It has to be admitted before us that the holder of this grove, Ram Manohar Ojha, and his widow were grove-holders, pure and simple. They held no zamindari in the village and the land is land which was granted by the zamindar for the purpose of planting a grove, the grantee agreeing to deliver one-half of the fruit to the zamindar.

In the case of *Habib-ullah* v. *Kalyan Das* (1) the late Sir SUNDAR LAL, J., reviewed the case-law on the subject of the status of a grove-holder and pointed out that the consensus of authority of cases decided both in this Court and by the Board of Revenue is in favour of the view that land held for the purposes of a grove is not land held for agricultural purposes. We do not propose to diverge from this view and to import any more uncertainty into the law on this point. Section 79 of the Tenancy Act enables a tenant who has been unlawfully ejected from his holding by a landlord to bring a suit to recover possession and compensation, and the period of limitation for such a suit is six months as laid down by the Act. A holding consists of lands held or let for agricultural purposes, and as pure grove land is not land held for agricultural purposes, the section cannot apply. The plaintiff's remedy can therefore lie only in the Civil Court and the ordinary period of 12 years' limitation will apply. The suit is therefore rightly brought in the Civil Court and is within limitation. The result, therefore, is that the appeal fails and is dismissed with costs.

(1) (1914) 12 A. L.J., 1080.

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SULAIMAN, J.:—I agree. The question of *res judicata* in the form in which it arises in this case does not seem to have come up directly before their Lordships of the Privy Council for decision. There are, however, certain dicta in two classes of cases which have been the source of conflicting decisions by the courts in India. In suits brought to challenge an adoption there are observations which have led courts to infer that the adjudication in such suits would bind all the subsequent reversioners. In *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (1) their Lordships laid stress on the peculiar nature of the suit, in which the plaintiff, upon a remote and contingent interest, comes into court not only to destroy the title of a person in possession of an estate, but to destroy his civil status. In *Rajendro Nath Holdar* v. *Jogendro Nath Banerji* (2) it was pointed out how unjust it might be after long lapse of time to deprive him of the status which an adopted son has acquired in the family into which he has been introduced. In *Jagadamba Chowdhrani* v. *Dakhina Mohun* (3) the desirability of allowing only a moderate time within which such delicate and intricate questions as those involved in adoption should be brought into dispute was emphasized. Sir BARNES PEACOCK in *Brojo Kishores Dassee* v. *Sreenath Bose* (4) even thought that "it had been decided by the Privy Council that such a decree is bindingupon the reversionary heirs in *Ranee Surnomoyee's* case" (2 W. R., P. C., 13). That case, however, decided nothing of the kind. On the other hand, certain remarks in suits brought to set aside an alienation by a limited owner were considered to lean the other way. In *Tekait Doorga Persad Singh* v. *Tekaitni Doorga Konwari* (5) their Lordships observed that "the decision (as to legal necessity) might not be final in his favour because the present plaintiff might die in the life-time of the widow, and the estate might never come to him". In *Isri Dut Koer* v. *Mussumut Hansbutti Koerain* (6) Sir ARTHUR HOBHOUSE when referring to the reason assigned for refusing relief on the ground of discretion, *viz.*, that the decision

(1) (1876) L. R., 3 I. A., 72.
(2) (1871) 14 Moo. I. A., 67.
(3) (1888) L. R., 13 I. A., 84.
(4) (1868) 9 W. R., C. R., 468.
(5) (1873) L. R., 5 I. A., 149.
(6) (1883) L. R., 10 A., 150.

may after all not be binding on the actual reversioners, remarked: "Nor it is readily conceivable that the decision will be fruitless because the question of law is of such a nature that its decision, though not binding as *res judicata* between the widow and a new reversioner, would be so strong an authority in point as probably to deter either party from disputing it". This last observation was taken by STRACHEY, C.J., in *Bhagwanta* v. *Sukhi* (1) to imply that their Lordships "indicate strongly that such a decision would not be binding as *res judicata* in the case of a new reversioner". And this opinion was followed in *Chhiddu Singh* v. *Durga Dei* (2) and *Darbari Lal* v. *Govind Ram* (3). These different conclusions led to a fine distinction between the legal effects of decrees in the two classes of cases, which is best illustrated by the following remark, on page 411, in *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (4):—"The result of the view that we take is that, though in suits relating to alienations by a qualified owner the dicta of the Privy Council preclude our holding that the presumptive reversioner represents remote reversioners, yet in suits to set aside an adoption the presumptive reversioner ought, on principle, to be held to represent the remote reversioner, provided the matter is decided after a fair trial". The basis of the distinction was that a suit to challenge an adoption was considered a representative suit, while a suit to set aside an alienation was not. As a logical result of this differentiation it was considered that if in a suit to set aside an alienation the plaintiff died the right to to sue did not survive and the suit abated: *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib* (5).

The whole aspect of the question has now been completely altered by the recent pronouncement of their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (6), emphasizing that a suit by a reversioner to set aside an alienation is also a "suit brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the

(1) (1899) I. L. R., 22 All., 83.
(2) (1900) I. L. R., 22 All., 832.
(3) (1921) I. L. R., 43 All., 514
(4) (1906) I. L. R., 29 Mad., 390.
(5) (1904) I. L. R., 27 Mad., 588.
(6) (1915) I. L. R., 38 Mad., 406.

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relief sought is for their common benefit", and that there is "the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights." This opinion has been reiterated in *Janaki Ammal* v. *Narayanasami Aiyer* (1).

In view of such a clear pronouncement as to the true nature of the suit, inferences from certain remarks in cases in which the point did not directly arise have no longer any weight: vide *Varamma* v. *Gopaladaeayya* (2). The main basis of the distinction having disappeared, in my judgment the decision in a suit to set aside an alienation would just as much be binding on all the reversioners as that in a suit to challenge an adoption. Further, it is to be borne in mind that the remarks of their Lordships were made in cases which arose while Act VIII of 1859 was in force. Section 1 of that Act, which embodied the principle of *res judicata*, did not contain any provision like the one which found place in the Acts of 1877 and 1882 and which is now to be found in Explanation VI to section 11 of the present Code of Civil Procedure. It seems to me that when once the representative character of the suit is accepted, the decision must, by virtue of the Explanation referred to above, operate as *res judicata*. The right to get the alienation declared invalid is a right claimed in common by the whole body of reversioners, and they must all, for the purposes of section 11, be deemed to claim under the persons litigating. The decision in a case instituted by the next reversioner would, therefore, if free from fraud or collusion, be final, and it would not be open to other reversioners to re-open the question; much less can it be open to a defeated transferee or his representatives to re-agitate the matter as against the actual reversioner who inherits the estate. It is true that a reversioner claims from the last male owner and not through another reversioner; but the legal effect of Explanation VI of section 11 of the Code of Civil Procedure is that such reversioner is deemed to have been represented through the person suing, and must, therefore, be bound by the adjudication and can also claim the benefit of it. There

(1) (1916) I. L. R., 39 Mad., 634. (2) (1918) I. L. R., 41 Mad., 659.

may be a large number of persons who have equal and independent title, and none of them may claim through another, yet they all may be deemed to be represented by only some of them who are actually suing.

I should like to add that it would simplify matters considerably, and would also avoid all possibility of collusion or carelessness in the prosecution of the case, if original courts while entertaining suits by reversioners to set aside alienations by limited owners were to follow the procedure prescribed by order I, rule 8, of the Code of Civil Procedure, and after the issue of the necessary notice implead remoter reversioners who may apply to be made parties. But even if this procedure has not been strictly followed, I would find it difficult to see how a defeated transferee, when subsequently sued by the actual reversioner, can claim not to be bound by the decree against him.

The other legal question raised in appeal involves no difficulty. The claim to recover possession of the grove cannot be barred by the six months' rule of limitation unless it be held that the suit should have been brought in the Revenue Court under section 79 of the Agra Tenancy Act. But the grove in suit not being land let or held for agricultural purposes is not a holding as defined by the Act, and so section 79 could have no application.

I therefore concur in the order proposed.

BY THE COURT :—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Stuart and Mr. Justice Wallach.

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July, 25.

HAR PRASAD (PLAINTIFF) *v.* RAM CHANDAR AND OTHERS (DEFENDANTS).*

Mortgage—Construction of document—Usufructuary mortgage executed by two persons—Additional sum borrowed by one of them with a stipulation that the mortgaged property would not be released unless both amounts were paid—"Mashrut-ul-rahn."

One of two co-owners of property, the subject of a usufructuary mortgage, borrowed a further sum of Rs. 50 from the mortgagee and executed a deed which commenced with a reference to the share of the executant which was

*Appeal No. 35 of 1920, under section 10 of the Letters Patent.

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already mortgaged to and in the possession of the mortgagee under the mortgage of 1880; the deed then set forth that the executant was borrowing the further sum of Rs. 50, and went on to stipulate that "when I shall redeem the mortgaged land I shall also pay the said amount, with interest at the stipulated rate, and then the mortgaged property shall be redeemed; without payment of the said sum the property shall not be redeemed." At the conclusion of the deed it was described as being by way of "*Mashrut-ul-rahn.*"

A purchaser from the mortgagors, having paid into Court the money due on the original mortgage and ousted the mortgagee from possession, the latter sued to recover possession relying upon the "*Mashrut-ul-rahn*" referred to above.

Held that the effect of the "*Mashrut-ul-rahn*" was to create a further usufructuary mortgage on the share of the executant, which was already under the mortgage of 1880 and was made security for the additional debt incurred, and that by the terms of that deed the mortgagee was entitled to retain possession of his share of the property until the amounts secured by the two documents were paid to him. The suit for recovery of possession was accordingly decreed in respect of the executant's share of the property.

Ranjit Khan v *Ramdhani Singh* (1) referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are fully set forth in the judgment of BANERJI, J.

Dr. *Surendra Nath Sen* and Babu *Binoy Kumar Mukerji* for the appellant.

Dr. *M. L. Agarwala* and Munshi *Kirpa Ram Dang* for the respondents.

BANERJI, J.:—The facts of this case are these:—Two brothers, Jhamman and Dhani Ram, made a usufructuary mortgage of two-thirds of certain zamindari property in favour of Har Prasad on the 28th of January, 1880, for a sum of Rs. 332. Under that mortgage the mortgagee obtained possession and got mutation of names in his favour. Subsequently Jhamman executed a document in favour of the same mortgagee, Har Prasad, by which he borrowed Rs. 50, with interest at the rate of 2 per cent. per mensem, and the contention is that this document created a usufructuary mortgage and placed on the property a further burden for the payment of the money secured by it. That is the question we have to consider in the present case. Jhamman sold a part of his share in the property to the defendant Ram Chandar. The heirs of Dhani Ram also sold part of Dhani Ram's share to the same defendant and to defendants nos. 4 and 5.

(1) (1902) I. L. R., 31 All., 482.

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The defendants last mentioned have not appeared and they have not contested the claim. Ram Chandar made a deposit of Rs. 332 under section 83 of the Transfer of Property Act. This sum the mortgagee Har Prasad refused to withdraw, alleging that the amount payable under the mortgage of the 28th of June, 1881, should also have been deposited, and without payment of that sum the property could not be redeemed and could not be taken out of his possession. Ram Chandar, however, did not make any further deposit, but he applied to the Revenue Court for mutation of names on the allegation that the mortgage of 1880 had been redeemed and that he had become the owner of the property. Mutation of names was granted in his favour and apparently Har Prasad, the mortgagee, was deprived of his possession as mortgagee of the proprietary interests. He thereupon instituted the present suit, claiming possession of the two-thirds share mortgaged to him on the 28th of January, 1880, and some mesne profits. The court of first instance dismissed his claim; the lower appellate court decreed it; but on appeal to this Court the learned Judge who heard the appeal restored the decree of the court of first instance. Hence this appeal under the Letters Patent. It has been conceded before us on behalf of the appellant that, so far as the half share of Dhani Ram is concerned, the claim for possession by the plaintiff is not maintainable. Dhani Ram was no party to the subsequent bond of the 28th of June, 1881, and therefore all that he was liable for was the amount of the prior mortgage of 1880. We have, therefore, to consider in this appeal whether the plaintiff is entitled to recover possession of the remaining half of the mortgaged property on the ground that the amount of the subsequent document of the 28th of June, 1881, has not been paid. The decision of this question depends upon the construction of the document last mentioned. It must be observed that no hard and fast rule can be laid down and that each case must be decided upon the construction of the particular document and the circumstances connected with it, and that upon the question of construction no light can be derived from the construction of similar documents in other cases. Coming now to the document of the 28th of June, 1881, it refers at its commencement to the

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one-third share of Jhamman, the executant of that document, which was already under mortgage to the plaintiff Har Prasad under the earlier document of 1880. He then proceeded to state that he was borrowing a further sum of Rs. 50 from the same creditor, and he added the following covenant, as translated in the paper book before us:—"The stipulation is that when I shall redeem the land mortgaged I shall also pay the said amount, with interest at the stipulated rate, and then the mortgaged property shall be redeemed. Without payment of the said sum the property shall not be redeemed." We have to consider what the intention of the executant of this document was in inserting this clause in it. In my opinion the effect of this clause was to create a further mortgage on the share of Jhamman which was already under mortgage with the creditor under the document of the 28th of January, 1880. The provision in the document is, as quoted above, that the property shall not be redeemed or released from the possession of the mortgagee unless the amount of the subsequent document was also paid. Therefore it is clear that in order to release the property from the possession of the mortgagee, Jhamman or his successors in title had to pay, not only the amount of the prior mortgage of 1880, but also the amount secured by the subsequent document of 1881. The property already under mortgage, to which reference was made at the commencement of the document, was in my opinion made security for the additional debt incurred under the document of 1881. So that the document of 1881 is a mortgage within the meaning of section 58 of the Transfer of Property Act. At the conclusion of the document it is described as "*mushrut-ul rahn*," that is, a mortgage, or, more correctly speaking, an additional mortgage. It is thus obvious that the intention of Jhamman was that he would not have the right to redeem the property unless he paid the two amounts already mentioned. It is urged that the subsequent document could not be deemed to be a usufructuary mortgage. I may observe in the first place that I do not agree with this contention. I may, however, also mention that the document which we have to consider in the present case was executed before the Transfer of Property Act was enacted, and therefore we have not to consider

whether the document creates a pure usufructuary mortgage within the definition contained in the Transfer of Property Act; in any case it is a document which would fall within the purview of section 98 of the said Act. In my opinion a document of this description should be deemed to be a document which creates a further encumbrance on the property and adds to the amount of the original usufructuary mortgage, and is a mortgage for the amount secured by it. As I have stated at the commencement of this judgment, each document should be construed with reference to its own terms and the circumstances under which it was executed. The document in the present case seems to me to be a further mortgage on the same property, and having regard to its terms, the mortgagee was entitled to continue in possession until the amount payable under this document was discharged. A large number of rulings have been cited to us, but in the view which I have taken of this document I do not deem it necessary to discuss those rulings. The case most near the present is the case of *Ranjit Khan* v. *Ramdhan Singh* (1). In that case the learned Judges did not clearly decide whether the subsequent document created a further mortgage or a further charge, but they held that in any view the earlier mortgage could not be redeemed unless the amount of the second document was paid. There are no doubt other cases in which, under circumstances almost similar to those of the present case, a contrary view was held; but, holding the view that I do, as stated above, I think it unnecessary to refer to those rulings. Dr. *Agarwala* laid great stress upon the fact that if a suit for redemption had been brought, the question would have been whether the mortgage of 1880 could be redeemed without payment of the amount of the subsequent document, especially in view of the fact that Dhani Ram, one of the original mortgagors, was no party to the subsequent document. In support of his contention he has referred to the case of *Muhammad Husain* v. *Sheodarshan Das* (2). That case no doubt supports his contention to a great extent, but it must be borne in mind that the present suit is not a suit for redemption of the prior mortgage. The question is whether the present plaintiff, the

(1) (1909) I. L. R., 31 All., 482. (2) (1907) 4 A. L. J., 176.

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mortgagee, is entitled to remain in possession of the property until the amount secured by the two documents has been paid to him. In the opinion which I have expressed, he is so entitled. The second document, so far as the share of Jhammun is concerned, being a mortgage created by him on the same property and as this mortgage is in substance an addition to the amount of the prior usufructuary mortgage, the mortgagee could not be dispossessed until the whole of the two sums secured by the two documents had been paid up. The case of *Hari Mahadaji Savarkar* v. *Balambhat Raghunath Khare* (1) was referred to. The subsequent document in that case may be deemed to be a simple mortgage and under the terms of that document, the convenant was that the document should be discharged at some time prior to the discharge of the earlier mortgage under which the mortgagee was in possession. If the learned Judges intended to hold that the subsequent document was not a mortgage on the property comprised in the earlier document, I feel myself unable, with great respect, to agree with that view. The case of *Lala Ram Narain Lal* v. *Lala Murlidhar* (2) was also cited. The facts and circumstances of that case were different and it is not necessary to say whether I agree with the decision in that case or not. The next contention on behalf of the respondents was that under the document of the 28th of June, 1881, the creditor could sue to recover his money and that therefore his claim upon that document is time-barred and cannot at present be enforced. I do not agree with this contention. That document does not confer on the creditor the right to sue for his money at any time. If the document is, as I hold it to be, an additional usufructuary mortgage, the mortgagee could not sue for his money and therefore no question of limitation can arise. The last contention on behalf of the respondents is that Ram Chandar must be deemed to be a tenant and therefore the suit could not be brought in the Civil Court for recovery of possession by his ejectment In the first place I may mention that this plea was not put forward either in the courts below or in this Court when the case was before the learned Judge who decided it. In the next place the suit does

(1) (1884) I. L. R., 9 Bom., 283. (2) (1920) 5 Pat. L. J., 644.

not relate to agricultural land and it is not asserted that the defendant Ram Chandar is a tenant of agricultural land. The property in dispute is zamindari property and the suit is one for recovery of such property. Therefore no question of tenancy can arise in this case. In the above view the result will be that the plaintiff would be entitled to recover possession of half of the property claimed by him. There is a further claim for mesne profits, but Dr. *Sen*, who appears on behalf of the appellant, does not press this part of the claim. I would, therefore, make a decree in the plaintiff's favour for half of the property claimed by him, and to this extent reverse the decree of the learned Judge of this Court.

STUART, J.:—The document of the 28th of June, 1881, commences by a reference to the previous deed of mortgage and continues that the executant has borrowed Rs. 50 from Har Prasad. It states that when the previous mortgage is redeemed that amount will be repaid with interest at 24 per cent. and that without payment of the amount due, the mortgaged property is not to be redeemed. The executant concludes by describing the document as "*mashrut-ul-rahn*". I had previously some doubts as to whether such a document was a mortgage within the meaning of section 58 of Act IV of 1882; but I have now arrived at the conclusion that it is a mortgage. It is true that there is no explicit transfer of an interest in specific immovable property, but taking the document as a whole, and in particular looking at the clause postponing redemption until the money is paid, it must, I think, be considered that the executant agrees that the mortgaged property shall remain in possession of Har Prasad until the additional amount secured by the deed, with interest, is repaid. The document can thus only be read as an addition to the previous document. The executant, who is the mortgagor under the previous deed, has taken a further advance, the property remains in possession of the mortgagee, and in addition to receiving the usufruct of the property the mortgagee is entitled to receive interest at 24 per cent. on the new loan. While agreeing that it is idle to endeavour to lay down that the interpretation of one document is to be according to the interpretation of another, I think it necessary to note

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that the present document is a very typical "*mashrut-ul-rahn*" as executed in the western districts. It may be stated generally that an omission explicitly to transfer an interest in specific immovable property does not necessarily show that the deed in which that omission is made is not a mortgage, for there may be an implied transfer of an interest which is equally efficacious. Subject to these remarks I am in complete accord with the judgment of my learned senior brother and would arrive at the same order.

WALLACH, J.:—I agree with the judgment of Mr. Justice BANERJI.

BY THE COURT.—The order of the Court is that the appeal is allowed in part, the decree of this Court is modified and a decree is made in the plaintiff's favour for possession of half of the property claimed by him. The remainder of the claim is dismissed. The parties will pay and receive costs in all courts in proportion to failure and success.

Decree modified.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

MAHADEO PRASAD SINGH (PLAINTIFF) *v.* MATA PRASAD AND ANOTHER (DEFENDANTS).*

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Hindu law—Hindu widow—Alienation by widow—Effect of the next presumptive reversioner joining in the alienation—Estoppel—Gift.

If the next presumptive reversioner at the time of a transfer made by a Hindu widow of property of her deceased husband assents to such transfer, neither he nor any of his successors in title can afterwards dispute its validity. *Trilochun Chakrabarti* v. *Umesh C. Lahiri* (1), *Sia Dasi* v. *Gur Sahai* (2) *Ramadhin* v. *Mathura Singh* (3), *Shib Chandra Kar* v. *A. C. Dutchen* (4), *Bakhtawar* v. *Bhagwana* (5), *T. B. Venkata Row* v. *T. V. Tuljaram Row* (6) and *P. Shanmugha Velayudham* v. *Koyappa Chettiar* (7) referred to. *Bai Parvati* v. *Dayabhai Manekharam* (8) not followed.

*First Appeal No. 141 of 1919, from a decree of Gauri Shankar Tiwari, Subordinate Judge of Allahabad, dated the 18th of January, 1919.

(1) (1880) 7 C. L. R., 571
(2) (1880) I. L. R., 3 All., 362.
(3) (1888) I. L. R., 10 All., 407.
(4) (1915) 28 C. L. J., 123.
(5) (1910) I. L. R., 32 All., 176.
(6) (1917) M. W. N., 30.
(7) (1920) M. W. N., 879.
(8) (1919) I. L. R., 44 Bom., 488.

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THE facts of this case are fully stated in the judgment of the Court.

Mr. *B. E. O'Conor* and Munshi *Badri Narain*, for the appellant.

Munshi *Panna Lal*, Dr. *Kailas Nath Katju* and Munshi *Balmakund*, for the respondents.

TUDBALL and SULAIMAN, JJ. :—This is a plaintiff's appeal arising out of a suit for recovery of possession of some immovable property and mesne profits. It appears that Pirthi Pal Singh was the last male owner and he died leaving a widow, Musammat Gajraj Kunwar, and a daughter, Musammat Balraj Kunwar. After the death of the widow, Musammat Balraj Kunwar entered into possession of the property as a limited owner. In the year 1897 Suraj Pal Singh was the immediate reversioner. On the 15th of October, 1897, Musammat Balraj Kunwar executed a perpetual lease in favour of Mata Prasad and Debi Sahai, the present defendants, on payment of a *nazrana* of Rs. 2,000, which was paid in cash before the Sub-Registrar. The rent reserved was Rs. 1,255-5-2, which was exactly equal to the Government revenue to be paid by the lessor. This lease was attested by Suraj Pal Singh the immediate reversioner. On the 29th of October, 1901, Musammat Balraj Kunwar and Thakur Suraj Pal Singh jointly executed a deed of gift of the leased properties in favour of the same lessees. Mutation of names followed on the basis of this deed of gift and Suraj Pal Singh was examined on oath and stated that he had consented to this gift. Musammat Balraj Kunwar died on the 9th of September, 1906. On her death Suraj Pal Singh became entitled to the estate and got possession of it. While being examined in the mutation court he again referred to the deed of gift and did not say that he repudiated it. Suraj Pal Singh lived for some three years more and died some time in 1909. It was not till the 4th of September, 1913, that the present suit was instituted on behalf of the minor son of Suraj Pal Singh under the guardianship of his mother. The suit is for possession of the gifted properties as against the donees by avoidance of the deed of gift, dated the 29th of October, 1901. The plaintiff's case as set forth in the plaint was that Suraj Pal had been made to

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execute the deed of gift under undue influence and pressure; that in any case his consent as a mere reversioner was of no avail and the transfer being without legal necessity, was not binding on the present plaintiff. On behalf of the defendants the allegations of undue influence and pressure were denied and it was pleaded that the consent of Suraj Pal Singh, the then immediate reversioner, completely estopped him as well as the present plaintiff from challenging the validity of the transfer. It was also pleaded that the gift had been made in lieu of good services rendered by the defendants' ancestor and was therefore not without consideration. There were a number of other pleas also raised which it is not necessary to mention. The court of first instance dismissed the suit, holding that the gift was for some consideration; that it was made with the consent of Suraj Pal Singh; that no undue influence had been proved, and that it was binding on the present plaintiff. The plaintiff has come up in appeal to this Court; but on his behalf no plea is raised in the grounds of appeal as to there having been any undue influence or pressure. It has, however, been strongly urged that the transfer was without consideration, that the consent of Suraj Pal Singh at a time when he had no transferable interest in the property, was invalid and that there is no estoppel against the plaintiff. It will be noted that the present suit is not for the cancellation of the lease of the 15th of October, 1897. The plaintiff ignores this lease altogether, and the defendants do not plead that, even if the gift is set aside, the plaintiff is not entitled to possession as the defendants hold the property under that perpetual lease. In fact both parties have treated this lease as having been superseded and put an end to by the deed of gift. This latter deed says in so many terms that "it should be known that the perpetual lease, dated the 15th October, 1897, and registered on the 3rd of December of the said year, which exists at present, is no longer to be considered valid and no right would be enjoyed under it." The perpetual lease had been granted in lieu of Rs. 2,000 paid as *nazrana* and was also in consideration of good services rendered by the lessees and their predecessors. It provided that if the lessees were dispossessed of any part of the leased

property they would have power to realize a proportionate amount of the *nazrana*. If, therefore, the lessees gave up all their rights under the lease and took a fresh document in the form of a deed of gift it cannot be said that this latter deed was absolutely without any consideration.

The learned counsel for the appellant, however, contends that the consent of Suraj Pal Singh can, at best, raise a presumption that there was legal necessity for the transfer, but as in this case it is conclusively shown that even if the transaction was not a pure gift it was certainly not for any legal necessity, the consent of the immediate reversioner had no operative effect. He has strongly relied on the following cases:—*Amrit Narayan Singh* v. *Gaya Singh* (1); *Gur Narain* v. *Sheolal Singh* (2); *Rangasami Gounden* v. *Nachiappa Gounden* (3) and *Bai Parvati* v. *Dayabhai Manohharam* (4).

In the case of *Amrit Narayan Singh* v. *Gaya Singh* (1) all that was held was that the guardian of a minor reversioner cannot bargain with the reversionary right on his behalf or bind him by any contractual engagement in respect thereto, for until the property actually vests in him he has nothing to assign or relinquish. No one can dispute that the right of succession of a reversioner is not a transferable right. That case, however, has no bearing on the present case, because no question of estoppel arose in that case nor could it have arisen against the minor reversioner.

In the case of *Gur Narain* v. *Sheo Lal Singh* (2), one Maha Sundar who was in possession of the estate of her son as a Hindu mother sold away portions of it under various deeds of transfer. Her daughter Musammat Bhawani Kunwar and her grandson Hanuman Sahai were alive at the time, and this Hanuman Sahai was a party to the conveyance with respect to one village. Neither Musammat Bhawani nor Hanuman Sahai were the next reversioners and on the death of Musammat Maha Sundar the property vested in two other persons who conveyed their rights and interests to Hanuman Sahai under a registered deed

(1) (1917) I. L. R., 45 Calc., 590. (3) (1918) I. L. R., 42 Mad., 528.

(2) (1918) I. L. R., 46 Calc., 566. (4) (1919) I. L. R., 44 Bom., 488.

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of transfer. The plaintiffs were Hanuman Sahai's sons and a transferee of part of the property from them. The alienees from Musammat Maha Sundar pleaded, *inter alia*, estoppel, inasmuch as Hanuman Sahai, the predecessor in title of the plaintiffs, was a party to one conveyance. Their Lordships of the Privy Council held that there could possibly be no estoppel, inasmuch as Hanuman had no assignable interest which he could convey or the assignment of which could enure to the purchaser and that this must have been fully known to the transferee. Hanuman Sahai had not in fact acquired the property as a contingent reversioner to Maha Sundar but got it under a deed of transfer by the two reversioners. In these circumstances his consent to the transfer by Musammat Maha Sundar could not operate as estoppel to the present claim, and the case is clearly distinguishable.

In the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1) a Hindu widow who was in possession of her husband's estate gifted a part of it to the then next reversioner who, however, predeceased her. The donee's heirs sold a part of the property and mortgaged another part of it to the plaintiff. On the death of the widow, the plaintiff, together with one of the heirs of the donee, became the reversioner to the estate. The plaintiff sued this heir for his half share. On behalf of the defendant it was pleaded that the plaintiff having taken a sale-deed and a mortgage-deed of part of the gifted property, had ratified the transfer by the widow and was estopped from challenging its validity. Their Lordships held that under the circumstances of the case no question of estoppel could arise. At the time when the plaintiff took the sale-deed and the mortgage-deed he did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift and that, therefore, by so doing he could not be held to have barred himself from asserting his own title after it had actually accrued to him. There was nothing to prevent him from taking a sale-deed and a mortgage-deed which would subsist only during the life-time of the widow. His conduct, therefore, could not amount to a ratification of the original gift. It will be

(1) (1918) I. L. R., 42 Mad., 528.

noticed that the previous Privy Council cases are cases where the reversioner who had given his consent to the transfer was not the reversioner who actually succeeded to the estate on the death of the limited owner. On page 538 of the report in 42 Madras, their Lordships, when referring to the case of *Bajrangi Singh* (1), remarked that "in that case the reversioners having consented to the alienations, they were bound by their own consent." None of these cases, therefore, is any authority against the contention that the consenting reversioner, if he happens to succeed, is personally estopped from going behind his consent.

The case of *Bai Parvati* v. *Dayabhai Manchharam*, (2) does certainly support the appellant's contention. In that case an owner died leaving a mother and two sisters, one of whom died after him. In 1891 the mother and the surviving sister gifted away two properties to the sons of the deceased sister. In 1911 after the mother had died, the sister sued to recover the properties from the donees. The Bombay High Court held that there was no estoppel against her and that the gift was valid only during the life-time of the mother.

Dr. *Katju*, who has argued this case with great ability, has laid before us a number of authorities which go to support his contention that so far as the consenting reversioner himself is concerned, he is, if he succeeds to the estate, estopped from challenging it. As early as the year 1880, PRINSEP, J., in the case of *Trilochun Chakraburti* v. *Umesh C. Lahiri* (3), remarked as follows :—

"On consideration of the authorities we are of opinion that the consent of the reversionary heir for the time being would be binding only upon him, etc."

In the case of *Sia Dasi* v. *Gur Sahai* (4) a Hindu widow, her deceased husband's mistress, his illegitimate daughter, and a next reversioner to the estate had entered into an arrangement for the distribution of the entire estate by an instrument of the year 1867. A remoter reversioner to the estate was a witness to this instrument and had given his full consent to the division.

(1) (1907) I. L. R., 30 All., 1. (3) (1880) 7 C. L. R., 571, 578.

(2) (1913) I. L. R., 44 Bom., 488. (4) (1880) I. L. R., 3 All., 362.

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The widow subsequently transferred part of the property in 1876 for payment of certain ancestral debts. On the death of the widow the remoter reversioner succeeded to the estate and was the person in whom the estate actually vested. He brought a suit for recovery of possession against the transferees by avoidance of the deeds of 1867 and 1876. As to the deed of 1876, the transfer was held to have been for the satisfaction of ancestral debts and was therefore valid. As regards the transaction of 1867 the defendant pleaded that the plaintiff, having himself consented to the distribution of the property, was estopped from contesting the legality of the said conveyance. This Court held that the plea of estoppel was well-founded and that it was no longer open to the plaintiff to challenge the validity of the distribution. This case is a clear authority in support of the respondents' contention.

In the case of *Ramadhin* v. *Mathura Singh* (1) a Hindu widow in possession of her husband's estate had made a gift of the property of her husband (it is not, however, clear whether it was the whole of the estate or only a part of it) to one of the two sons of her daughter. The donee sold a part of it to the plaintiffs. The plaintiffs, however, could not get possession of the property and the widow died. The plaintiffs, therefore, brought a suit for recovery of possession of the property transferred to them against the daughter, the donee, and the other son of the daughter. The defendants pleaded that the gift was not operative beyond the life-time of the widow and that the daughter's consent was immaterial. The question that arose in the case was whether the plaintiffs were entitled to the life interests of the widow and the daughter or not, but the question as to who would be the person entitled on the death of the daughter did not then arise. This Court held that a Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interests of the widow and that of the consenting reversioner are concerned. It will be noticed that in this case the gift was in favour of only one of the grandsons and no question of surrender of the whole estate to his donee could arise. This

(1) (1888) I. L. R., 10 All., 407.

case also clearly supports the contention of the learned vakil for the respondents.

This last case was followed in the case of *Shib Chandra Kar* v. *A. C. Dulcken* (1), where the sons of a Hindu daughter in possession of her father's estate had joined in a mortgage executed by their mother and it was held that they could not be allowed to go back upon the representations made by them in the mortgage-deed. In this case, however, there had been an express representation in the mortgage-deed that the money was being raised for such legitimate purposes as justified an absolute alienation of the inheritance of a limited owner, and it was held that the sons after they had succeeded to the estate were concluded by their solemn declarations and were not free to resile from the position they deliberately took up and go behind the representations of fact made by them The question as to their competency to bind their expected interest as reversioners by actual interest before the succession had opened out was not expressly considered.

The case of *Bakhtawar* v. *Bhagwana* (2) was a case where a remoter reversioner had brought a suit for a declaration that a gift executed by a Hindu widow was inoperative as against the contingent reversioners. The immediate reversioner, however, had consented to the transfer. It was contended, *inter alia*, that the plaintiffs being remote reversionary heirs were not entitled to maintain the suit for the cancellation of the gift. On page 178 the learned Judges who decided that case remarked that there was no force in that contention, for the nearest reversionary heir by consenting to the gift and concurring in the act of the widow had precluded himself from disputing the validity of the impeached gift. Consequently the plaintiffs as next presumable reversioners would be entitled to sue. They referred to the case of *Rani Anand Kunwar* v. *The Court of Wards* (3), where their Lordships of the Privy Council remarked that if the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the

(1) (1915) 28 C. L. J., 128. (2) (1910) I. L. R., 32 All., 176.

(3) (1889) I. L. R., 6 Calc., 764.

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widow, or has concurred in an act alleged to be wrongful, the next presumable reversioner would be entitled to sue.

In an unreported Letters Patent Appeal No. 49 of 1915, decided on the 28th of May, 1915, which affirmed the judgment of KNOX, J., in *Jamna Kunwar* v. *Ramkit Singh* (1), a Hindu widow had with the consent of her husband's mother, gifted the whole estate to persons who were the reversioners next to the mother, and it was held that on the death of the widow the mother who had consented to the transfer could no longer be entitled to oppose the same. The decision seems to have proceeded on the principle of estoppel though it could also be supported on the ground that the transfer amounted to a surrender of the whole estate.

Our attention has also been drawn to two cases of the Madras High Court, *T. R. Venkata Row* v. *T. V. Tuljaram Row* (2) and *P. Shanmugha Velayudham* v. *Koyappa Chettiar* (3). In the first of these cases a Hindu widow in pursuance of a promise had alienated part of the estate of her husband in consideration of certain debts of the husband being paid by the transferee. The next reversioner had attested the deed and given his express consent to it. It was held that he was estopped from afterwards disputing the transaction when the succession opened to him. In the second case the first defendant who was one of the reversionary heirs was a party to a number of transactions by which item No. 1 of the properties in dispute was divided and devolved solely on one Karuthan. The question raised was whether the first defendant having been a party to all those transactions could, when the reversion had fallen to him, turn round and claim the same property against the person who derived title under these transactions. The learned Judges of the Madras High Court pointed out that the doctrine of estoppel as laid down in the Evidence Act was a rule of pleading based upon a man's conduct who by his representations made to a third party has induced the latter to alter his position, and that, therefore, the mere fact that the presumptive reversioner had no vested interest in the estate which he could effectively deal with,

(1) (1915) 28 Indian Cases, 496. (2) (1917) M. W. N., 30.

(3) (1920) M. W. N., 87.

did not prevent the application of the rule of estoppel if he had by his conduct induced another person to alter his position. They accordingly held that the plea of estoppel was well-founded.

It will thus appear that the weight of authority is entirely on the side of the respondents. The case of *Bai Parvati* v. *Dayabhai Manchharam* (1), relied on by the learned counsel for the appellant, may be distinguishable. We have not had the advantage of seeing the deed of transfer in that case, but we gather from the judgment that it purported to effect a transfer of the limited interest of the mother and the sister's chance of succession. The judgment clearly states that "it is not a case of an alienation by a widow of property of which she is the life tenant with the consent of the next reversioner." If all that was held in that case was that the deed purported to transfer a mere chance of succession and that such transfer was void, then no difficulty arises. But if it was intended to lay down the general proposition that in no case a reversioner can by his act or conduct estop himself from challenging a transfer after he has succeeded to the estate, then we would not agree with the decision.

We are accordingly of opinion that Surajpal, who actually become the owner after the death of Musammat Balraj Kunwar, by having joined in the deed of gift was estopped from challenging it and that the plaintiff who claims through Surajpal is equally estopped.

The result is that this appeal fails and is hereby dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Kanhaiya Lal.

BADAL RAM (DEFENDANT) *v.* JHULAI (PLAINTIFF).*

1921 *June*, 25.

Act No. I of 1872 (Indian Evidence Act), section 92, provisos (2) and (3) —Evidence—Admissibility of—Registered deed of relinquishment of part of leasehold land—Contemporaneous oral agreement regarding payment by landlord of a certain sum.

Plaintiff was a *parjotdar* with a holding of 1 bigha 15 biswas at a rental of Rs. 40 per annum. He executed and registered a deed of relinquishment by

* Civil Revision No 45 of 1921.

(1) (1919) I. L. R., 44 Bom., 488.

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BADAL RAM v. JHULAL.

which he gave up 17 biswansis of his holding and agreed to pay Rs. 21 as rent for the remaining land. The landlord on his part entered into an oral agreement to pay to the plaintiff Rs. 200, out of which Rs. 32 were to be credited in settlement of certain arrears of rent due. The landlord, however, sued for the arrears and obtained a decree. Plaintiff then sued for recovery of Rs. 200 under the abovementioned oral agreement.

Held that plaintiff was not precluded by reason of the existence of the registered deed of relinquishment from giving evidence of the oral agreement under which he claimed. *Abdul Hamid* v. *Abdul Majid* (1), *Ram Bakhsh* v *Durjan* (2) and *Motabhoy Mulla Essabhoy* v *Mulji Haridas* (3) referred to.

THIS was an application in revision under the Provincial Small Cause Courts Act.

The facts of the case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Munshi *Harnandan Prasad*, for the respondent.

KANHAIYA LAL, J.:—The plaintiff was *parjotdar* of 1 bigha 15 biswas of land, for which he used to pay Rs. 40 per year as ground rent to the defendant. On the 16th of May, 1917, the plaintiff relinquished 17 biswansis of land and agreed to pay Rs. 21 per year for the remaining land. A formal deed of relinquishment was executed by him, in which it was stated that the plaintiff did so because the portion of land relinquished was not fit for cultivation.

The allegation of the plaintiff was that at the time he executed the said deed of relinquishment there had been a separate oral agreement between him and the defendant by virtue of which the latter agreed to pay Rs. 200 to the former, out of which Rs. 32 were to be credited towards the arrears of rent due by the former to the latter. Subsequently the defendant filed a suit for the recovery of Rs. 32 due to him on account of the said arrears of rent and obtained a decree against the plaintiff. The present suit was filed by the plaintiff for the recovery of Rs. 200 with interest on the strength of the oral agreement aforesaid. The court below found in favour of the plaintiff and decreed the claim.

It is urged on behalf of the defendant that the court below had erred in admitting oral evidence to vary the terms of the deed of relinquishment. The deed of relinquishment is a voluntary

(1) (1918) 11 A. L. J., 770. (2) (1887) I. L. R., 9 All., 392.

(3) (1915) I. L. R., 39 Bom., 399.

document executed by one party. It is silent as to whether any payment was to have been made to the plaintiff as alleged. It recites that the portion of the land relinquished was not fit for cultivation and was relinquished in consequence, and that the plaintiff shall pay Rs. 21 per year for the remaining land. According to the court below that relinquishment was agreed to by the plaintiff on the strength of a separate oral agreement given by the defendant that he would pay Rs. 200 to the plaintiff in the manner above specified. The question of the existence or otherwise of consideration can always be inquired into irrespective of what is entered in the deed. The deed does not say that the relinquishment was to be made without any payment. It is silent, and the plaintiff was entitled to prove this separate oral agreement under proviso (2), section 92, of the Indian Evidence Act of 1872.

It is argued that the deed of relinquishment was a formal document, registered in the manner required by law, and the decision in *Abdul Hamid* v. *Abdul Majid* (1) is relied on to show that in the case of such a formal document no evidence about any extraneous matter not referred to in the deed ought to have been admitted. In that case a petition of compromise was filed, by which the disputed property was partitioned in a certain manner and a decree was passed in accordance with the compromise. The allegation of the plaintiff was that the defendant had agreed at the time of compromise to pay a certain sum to the plaintiff in order to equalize the loss. But the evidence adduced by him in support of such an agreement was held to be inadmissible because it was treated as a part and parcel of the agreement evidenced by the compromise, no variation of which could be permitted after a decree was passed in accordance with it. In the present case there were reciprocal promises, each forming a consideration for the other. The plaintiff had agreed to relinquish certain land and to hold the remainder on reduced rent. The defendant, on the other hand, had agreed to pay him a certain sum of money, out of which a portion was to be credited towards the arrears of rent then due. In *Ram Bakhsh* v. *Durjan* (2), where in defence to a suit upon a hypothecation bond payable

(1) (1918) 11 A. L. J., 770. (2) (1887) I. L. R., 9 All., 392.

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MUHAMMAD ABDUL HADI v. BALDEO SAHAI

only. The result in the Revenue Court was that when the account came to be taken between the parties the rate of Rs. 34 per annum was accepted and the plaintiff's claim decreed accordingly.

Abdul Hadi then applied for an order to prosecute the patwari Baldeo Sahai on a charge under section 218 of the Indian Penal Code, that is, a charge of having framed an incorrect record. A charge under this section is triable by the Court of Session only.

The Magistrate took the evidence for the prosecution; framed a charge, and, acting under the powers conferred upon him by section 212 of the Code of Criminal Procedure, examined certain witnesses whom the accused had cited in his defence. After hearing these witnesses he wrote an order of discharge under the provisions of section 213, sub-section (2), of the Code of Criminal Procedure.

The complainant Abdul Hadi went to the Sessions Judge in revision. The learned Judge refused to interfere with the order of discharge.

In this application before me it is broadly contended that the order of discharge is an improper one, inasmuch as the Magistrate has practically usurped the functions of the Sessions Judge and has tried the case himself. I have examined the judgment of the Magistrate very carefully, and, after due consideration, I am not prepared to say that there was anything improper or illegal in the order which the Magistrate passed. It is true that in a number of cases it has been laid down that it is the duty of a Magistrate who is dealing with a case triable only by a Court of Session to commit the accused for trial to the latter court if any reliable evidence is produced before him which satisfies him that there is sufficient ground for taking such a course. The earlier law on the subject was altered by the provision which was introduced for the first time into the Code of Criminal Procedure of 1898, by which the Magistrate became entitled to examine defence witnesses whom the accused desired to be produced in court, and since that time it has been held in more than one case that if the Magistrate, after hearing the defence witnesses, comes to the conclusion that their evidence

rebuts that produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and may pass an order of discharge under section 213 of the Code of Criminal Procedure. That was the view taken by Mr. Justice PIGGOTT in the case of *Dharam Singh* v. *Joti Prasad* (1). I agree with the view taken by the learned Judge. That was also a case in which defence evidence had been called in the committing magistrate's court and the Magistrate had come to the conclusion that the defence witnesses were more worthy of belief than those produced by the prosecution. I have decided, therefore, that this case should not be allowed to go any further. The order of discharge was in my opinion correct. I dismiss this application.

Application rejected.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

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July, 7.

ZAMIR-UL-HASAN KHAN (DEFENDANT) v. IMDAD ALI KHAN. (PLAINTIFF).*

Act No. IX of 1887 *(Provincial Small Cause Courts Act), section 85—Jurisdiction—Appeal—Suit instituted in Court of Munsif having Small Cause Court Jurisdiction—Munsif succeeded by another not having such jurisdiction—Suit tried by latter officer—Appeal.*

A suit for damages for cutting a branch of a tree was instituted in the Court of a Munsif having Small Cause Court powers. Before the suit was heard the Munsif went on leave and was succeeded by a Munsif who had not Small Cause Court powers, and who accordingly tried the suit as a regular suit.

Held that this procedure was correct and an appeal lay from the decree passed in it *Sarju Prasad* v. *Mahadeo Pande* (2) referred to.

THIS was an application for revision under the Provincial Small Cause Courts Act, 1887.

The facts of the case sufficiently appear from the judgment of the Court.

Mr. *S. Abu Ali*, for the applicant.

The opposite party was not represented.

BANERJI, J.:—This is an application for revision against an order of the First Additional Subordinate Judge of Aligarh, refusing to entertain an appeal preferred by the applicant and

* Civil Revision No. 137 of 1920.

(1) (1915) I. L. R., 37 All., 855. (2) (1915) I. L. R., 37 All., 450.

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dismissing it on the ground that no appeal lay. The facts were these:—A suit was brought in the Court of a Munsif who had been vested with the jurisdiction of a Court of Small Causes for the recovery of damages for cutting down the branch of a tree. The suit was undoubtedly one of the nature cognizable in a Court of Small Causes and was accordingly instituted on the Small Cause Court side of the Munsif's Court. Before the cause came to trial the Munsif proceeded on leave and was succeeded by an officer who was not vested with the powers of a Small Cause Court Judge. He tried the suit as a regular suit and made a decree for a portion of the claim. An appeal was preferred from that decree, but the appellate court refused to entertain the appeal and held that no appeal lay. This view of the lower appellate court is in my opinion erroneous. Under the provisions of section 35 of the Provincial Small Cause Courts Act, if a court vested with the powers of a Court of Small Causes ceases to have such powers, the officer who tries the case should try it as a suit which he would ordinarily have tried. In the present case the Munsif who tried the suit had no Small Cause Court powers, and, therefore, he was bound to try the suit as a regular suit instituted in the Court of a Munsif who did not possess Small Cause Court powers. In the present instance the Munsif tried the suit, and, therefore, an appeal lay from his decree to the District Judge. The appellate court seems to have been of the opinion that the Munsif ought to have returned the plaint for presentation on the regular side of the court. I do not agree with this view, as at the time when the Munsif proceeded to try the suit he had no jurisdiction to try it as a Small Cause Court suit, and this is what section 35 of the Small Cause Courts Act provides. This case is very similar to that of *Surjn Prasad* v. *Mahadeo Pande* (1). I agree with the ruling in that case and I hold that the District Judge had jurisdiction to entertain the appeal and the lower appellate court ought to have tried it on the merits. I allow the application, set aside the decree of the lower appellate court and remand the case to that court with directions to try it on the merits. Costs here and hitherto will be costs in the cause.

Application allowed.

(1) (1915) I. L. R., 37 All., 450.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Lindsay.

BISMILLAH BEGAM (PLAINTIFF) *v.* NUR MUHAMMAD (DEFENDANT).* 1921 July, 18.

Muhammadan law—Sunnis—Right of woman to repudiate a marriage performed during minority—Exercise of right of repudiation dependent on knowledge of the woman that she has such right.

Held, following the rule laid down by Imam Muhammad as the more reasonable and equitable rule to be applied in India, that amongst Sunni Muhammadans, the right of repudiation exercisable by a girl married during her minority depends upon her knowledge that she has such right, and may be enforced within a reasonable time after she comes to know of its existence.

THE facts of this case are stated in the order of remand below.

Mr. *M. Ishaq Khan*, for the appellant.

Mr. *Abu Ali*, for the respondent.

TUDBALL and RAFIQ, JJ.:—This appeal arises out of a suit brought by the plaintiff appellant Musammat Bismillah for a declaration that she had lawfully repudiated her marriage with her husband, the defendant respondent Nur Muhammad, and that the decree, dated the 31st of March, 1915, obtained by the latter against her for restitution of conjugal rights was of no force. She alleged that she repudiated the marriage soon after the attainment of her puberty. The admitted facts are that the marriage between the parties took place when the plaintiff appellant was a minor and the marriage was brought about under the guardianship of her mother. Some time after the marriage Nur Muhammad, who himself was a minor at the time of marriage, sued for restitution of conjugal rights and obtained a decree on the 31st of March, 1915. On the 27th of August, 1917, the suit out of which this appeal has arisen was filed by Musammat Bismillah for the declaration mentioned above. At the time of the suit the age of her husband was 17. Several pleas were urged on behalf of the defence. The court of first instance dismissed the claim holding that the plaintiff was still a minor, that there had been a valid retirement between her and her husband and that the repudiation, if any,

* Second Appeal No. 1042 of 1918, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 27th of May, 1918, confirming a decree of Piari Lal Govil, Munsif of Etawah, dated the 20th of December, 1917.

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was invalid. On appeal the learned Judge affirmed the decree of the first court on the sole ground that the repudiation by Musammat Bismillah was not made immediately on attaining her puberty but within two or three months of it. The parties being *Sunnis* are bound by the Hanafi Law and, according to the learned Judge, under that law the repudiation ought to have been made immediately on attaining puberty.

Musammat Bismillah came up in second appeal to this Court and her appeal came up for hearing before a learned Judge of this Court. It was represented to him that the dispute between the parties raised an important point of law and that the appeal should be referred to a Bench of two Judges. The learned Judge acceded to the request of the learned counsel for the parties and has referred the case to a Bench of two Judges.

We do not at present express any opinion upon the merits of the case or the accuracy of the finding of the learned Judge of the lower appellate court. We think it advisable in the interests of justice to have a finding on the following point, namely:—"When did Musammat Bismillah first come to know that she had a right of repudiating her marriage?." The lower appellate court will receive evidence upon this issue and return a finding as soon as possible.

The learned Judge will also record a finding on the third issue, namely, whether the marriage of the parties has been consummated, upon which he omitted to record a finding in his judgment under appeal. The lower court will return its findings at an early date. On receipt thereof the usual ten days will be allowed for filing objections.

On receipt of the findings the following judgment was delivered.

TUDBALL and LINDSAY, JJ.:—On the issues remitted, the court below has come to a definite finding that the marriage has not been consummated, but its finding on the other issue, namely,—"When did Musammat Bismillah first come to know that she had a right of repudiating her marriage?"—is by no means definite or clear. The story told by the girl and her uncle is that a pleader, Shaikh Ahmad Husain, was consulted and when

he gave his opinion her uncle Abdullah informed the girl and she at once repudiated the marriage. The uncle Abdullah and the girl herself put this at a period of some three years before they gave their evidence. Ahmad Husain, on the other hand, put it at some 3½ years; but he was by no means definite, and the court came to the conclusion that it must have been some time between November, 1916, and January, 1917. The repudiation was made on the 7th of March, 1917. The lower court has assumed that the appellant was informed of the opinion of Shaikh Ahmad Husain at the very time that it was given. It is very difficult, if not impossible, to fix the exact time when the plaintiff was informed of her right of repudiation, but we may take it that the fact that a pleader was consulted shows that her intention was to repudiate, and I think we may accept it as clear that the girl repudiated the marriage without any unreasonable delay. The lower appellate court at first found that the repudiation took place about 2 or 3 months after the girl had arrived at the age of puberty. The issue was remitted because this Bench was of opinion that the rule laid down by Imam Muhammad was the more reasonable and equitable rule to be applied in India, namely, that a woman's right of option is prolonged until she is acquainted with the fact that she has such a right. In other words, that if she does not know that she has a right of rescinding the marriage, she will have the power to do so when she is aware of it. We think in the circumstances that the plaintiff appellant repudiated the marriage without any unreasonable delay after she became aware of her right to do so. In these circumstances we think that the plaintiff's suit ought to have been decreed. We, therefore, allow the appeal, set aside the decrees of the courts below and decree the declaration asked for by the plaintiff that she has lawfully repudiated her marriage with her husband, the defendant respondent Nur Muhammad, and that the decree, dated the 31st of March, 1915, obtained by the latter against her for restitution of conjugal rights is now of no force. The plaintiff will have her costs in all courts.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

1921 July, 11.

SHEO SARAN CHAUDHRI AND OTHERS (DEFENDANTS) *v.* RAM LAGAN DAS (PLAINTIFF) AND AUTAR CHANDAR AND OTHERS (DEFENDANTS).*

Act No IV of 1882 (*Transfer of Property Act*), *sections* 83 *and* 108—*Mortgage —Tender—Mortgage executed in the name of a minor member of a joint Hindu family, though in reality a family transaction, the mortgage money being supplied from the joint family funds.*

A mortgage was executed in favour of a minor member of a joint Hindu family The mortgagor paid the mortgage money into court and asked for service of notice on "Ram Lagan, minor, under the guardianship of his father Mahadeo Das," and notice was issued accordingly; but all that was done was that the notice was affixed to the door of the house and the serving officer reported that he was not able to effect personal service on either the minor or his father. No application was made by the mortgagor for the appointment of a guardian *ad litem*.

Held that no valid payment had been made within the meaning of section 83 of the Transfer of Property Act, 1882, so as to stop the running of interest. *Pandurang Babu Parab* v *Mahadaji Moteshwar Gokhale* (1) referred to.

Where, however, a mortgage, though executed in the name of a minor member, is in reality a mortgage taken by the head of a joint Hindu family, the mortgage money being supplied from the joint family funds, it may well be held that an offer to pay the money due on such a mortgage to the managing member is a good and valid tender in the eye of the law

THE facts of this case sufficiently appear from the following order of the Court.

Dr. *M. L. Agarwala*, for the appellants.

Dr. *Surendra Nath Sen* and Munshi *Haribans Sahai*, for the respondent.

LINDSAY and STUART, JJ.:—This case had already been before us and was adjourned for the production of the record of certain proceedings which were taken under section 83 of the Transfer of Property Act.

We sent for that record in order to enable us to decide a plea which was raised in both the courts below. It was whether a deposit which undoubtedly was made by the mortgagors in this case was a valid deposit so as to stop the running of interest.

It has been found as a matter of fact that the mortgagee in this case, that is to say, the person in whose favour the mortgage

* Second Appeal No 613 of 1919, from a decree of I. B. Mundle, Officiating District Judge of Gorakhpur, dated the 4th of March, 1919, confirming a decree of Shams-ul-Hasan, officiating Subordinate Judge of Gorakhpur, dated the 26th of August, 1918

(1) (1902) I. L. R., 27 Bom., 23.

purports to have been executed, was one Ram Lagan, who was at the time of the mortgage a minor. So far as can be ascertained, he was at that time about five years of age, and according to the evidence on the record the court below has found that he was a member of a joint Hindu family along with his father, one Mahadeo Das.

The record of the section 84 proceedings has been brought before us and from this it appears that on the 19th of August, 1909, an application was made to the court asking for service of notice on the mortgagee who was described as "Ram Lagan minor, under the guardianship of his father Mahadeo Das." It was also proved from the record that on the date this application was presented the mortgagors deposited into the court a sum of Rs. 1,446-6-0 which represented the sum then due on account of the mortgage.

It is further clear, however, that no application was ever made to the court for the purpose of having Mahadeo Das constituted the guardian *ad litem* of his minor son Ram Lagan for the purpose of receiving service of notice under section 83 of the Transfer of Property Act. A notice did issue addressed to Ram Lagan under the guardianship of his father Mahadeo Das. All that appears is that this notice was stuck up on the doorpost of the house and that the serving officer reported that he was not able to effect personal service either on the minor or the father. When this notice was returned the court directed the proceedings to be shelved.

It would, in our opinion, be impossible to hold that the courts below were wrong in deciding that the minor was not bound by these proceedings under section 83. The law on the subject, which is contained in section 108 of the Transfer of Property Act, has, we think, been rightly interpreted by the court below, and in support of the interpretation there is a ruling of the Bombay High Court—*Pandurang Babu Parab* v. *Mahadaji Moreshvar Gokhale* (1).

The matter, however, does not appear to us to end here. Mr. *Agarwala* for the appellants has contended that, apart from the deposit proceedings taken under section 83 of the

(1) (1902) I. L. R., 27 Bom., 23.

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Transfer of Property Act there was, in fact, a valid tender of the mortgage money before the money was put into court. This plea was raised in the lower appellate court, but the learned District Judge refused to entertain it on the ground that no such case had been set up in the written statement.

It is quite true that no such plea of tender, as distinct from the deposit in court, was raised in the written statement which has been filed. We have, however, certain statements made by the pleaders of the parties which are set down on page 10 of the paper book. Those statements perhaps do not indicate that a direct tender of the money was made to Mahadeo Das, the father of Ram Lagan, but it may at any rate be said that they suggest that something of the kind was done. We notice, moreover, that evidence was allowed to be adduced in the first court for the purpose of showing that a definite offer of the mortgage money was made to the father of Ram Lagan. The Subordinate Judge had dealt with this matter at length in his judgment and we need not at the present stage refer to it further.

There can be no doubt that at the time this mortgage was made the present plaintiff Ram Lagan was according to the findings of the court below a lad of about five years of age. It is apparent that he and his father Mahadeo Das constituted a joint Hindu family and that Mahadeo Das was the managing member of that family. If we are to take into account the fact that this transaction of mortgage was really entered into by the joint family consisting of Mahadeo Das and his son and if we believe that at the time of these deposit proceedings, that is to say, in the year 1909, Ram Lagan was still a minor, then we think it might well be held that an offer to pay the mortgage money to the managing member of the joint family was a good and valid tender in the eye of the law.

It has, however, been objected that this case was not definitely set up in the court below, and that perhaps is correct. At the same time there is evidence on the record to indicate that the money which was advanced was the property of a joint Hindu family and we think for the purpose of doing justice between the parties, this is a question which requires further investigation. It is to be observed that on the 29th of August, 1909, when

the deposit was made in court, the mortgage amounted to Rs. 1,446-6-0. At the present time the claim has swelled to Rs. 3,896-12-0, the difference representing the interest which has accrued between the year 1909 and the year in which this suit has been brought. The matter is one of great importance to the representatives of the mortgagors and we think, as we have said, that complete justice cannot be done without a further investigation into the matter. We have, therefore, decided to remit two issues to the lower appellate court for disposal. They are as follows :—

(1) Was the mortgage debt due under the deed of the 15th of December, 1900, for the purpose of securing which the bond in suit was executed, a debt due to the joint Hindu family consisting of Mahadeo Das and his son Ram Lagan, or was the money due to Ram Lagan alone?

(2) Was an unconditional tender of the mortgage money made to Mahadeo Das by the appellant?

The parties will be at liberty to adduce any evidence they choose on these issues and the court below should return its findings within two months from the date of the receipt of this order. Ten days will be allowed after the findings have been received in this Court to file objections.

Issues remitted.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

SHIB LAL (PLAINTIFF) *v.* MUNNU LAL AND OTHERS (DEFENDANTS.)*

1921 *July* 11.

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 74 *and* 95—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 69—*Mortgage—Effect of satisfaction of prior mortgagee's decree by puisne mortgagee—Charge—Suit by prior mortgagee to recover money so paid—Limitation—Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, articles* 61 *and* 132

Where a second mortgagee discharges a decree obtained by the first mortgagee, he acquires a charge on the mortgaged property as from the date upon which he made payment in satisfaction of the decree, as well as a right to be re-imbursed by the mortgagor personally; but he is in no sense an assignee of either the mortgage or the decree. *Gopi Narain Khanna* v. *Bansidhar* (1) referred to. *Nathuram* v *Shee Lal* (2) dissented from.

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* Second Appeal No. 972 of 1918, from a decree of A. G. P. Pullan, District Judge of Mainpuri, dated the 27th of April, 1918, confirming a decree of Piari Lal Katara, Subordinate Judge of Mainpuri, dated the 31st of January, 1918.

(1) (1906) I. L. R., 27 All., 825. (2) (1917) 42 Indian Cases, 796.

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SHIB LAL v. MUNNI LAL.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *M. L. Agarwala* and Mr. *A. Sanyal*, for the appellant.

Pandit *Baldeo Ram Dave* and Munshi *Girdhari Lal Agarwala*, for the respondents.

BANERJI and GOKUL PRASAD, JJ.:—The facts of this case are these. In 1886 certain persons mortgaged their property to one Shadi Lal. In 1906 they mortgaged the same property to the present plaintiff Shib Lal. Shadi Lal brought a suit upon his mortgage and obtained a decree for sale against the mortgagors and the second mortgagee, the present plaintiff, on the 17th of January, 1912. The decree was not discharged by the mortgagors, and therefore, on the 24th of January, 1914, that is, before the decree had become time-barred, the present plaintiff paid on account of the aforesaid decree, and in discharge of it, a sum of Rs. 2,297. After the discharge of the decree by the abovementioned payment the mortgagors sold a part of their property to one Mohan Lal. The defendant Panna Lal brought a suit for pre-emption in respect of this sale and obtained a decree. He deposited in court an amount which discharged the second mortgage held by the plaintiff. This amount had not been paid by the transferees of the property, and consequently the pre-emptor had to pay it and the second mortgage was thus satisfied. After this the present suit was brought by the plaintiff to recover Rs. 2,297 principal and Rs. 811-8-0 interest from the mortgagors and from the property against which the mortgage decree had been passed and a part of which is admittedly in the possession of Panna Lal, defendant. Various defences were raised in the courts below, but both those courts have dismissed the suit on the ground of limitation. The learned Subordinate Judge who tried the suit was of opinion that the plaintiff stepped into the shoes of the first mortgagee Shadi Lal and that, as Shadi Lal's mortgage could be enforced only after 1888, the plaintiff could not recover his money after the lapse of twelve years from that year. This view also found favour with the lower appellate court. The learned Judge of that court says in his judgment that the right of the plaintiff to recover the money

arose at the time when the first mortgagee's right to recover it accrued. We do not agree with this view. In our opinion the right of the plaintiff to recover the amount claimed by him accrued to him only on the date on which he made the payment. He was a second mortgagee of the property comprised in the first mortgage and was therefore interested in paying off the amount of that mortgage and the decree obtained on the basis of it. There was a liability for the amount of the decree on the mortgagors personally and also on the property mortgaged. Of this liability the plaintiff relieved the mortgagors and their property by payment on the 24th of January, 1914, when the decree was still enforceable. By such payment and by relieving the defendants mortgagors and their property of the liability which existed on them, he, by virtue of the provisions of section 69 of the Contract Act, acquired a right to be re-imbursed the money which he had paid for the benefit of the mortgagors and for the protection of their property. As he was the second mortgagee, he was interested in seeing that the property was not sold in execution of the decree on the first mortgage, as otherwise he would not have been entitled to enforce his own mortgage on the property. As there was a charge on the mortgagors' property in favour of the first mortgagee, and the second mortgagee, the present plaintiff, discharged that charge, he acquired a charge on the property. On the principle of section 95 of the Transfer of Property Act which has been held not to be exhaustive, a co-mortgagor who discharges a mortgage is entitled to a charge on the property of the other mortgagor. On the same principle a second mortgagee who discharges a prior mortgage acquires a charge on the property which he relieves of liability for that mortgage. This is also manifest from the provisions of section 74. This charge he acquires, not when the prior mortgage was made nor when that prior mortgage could be enforced, but on the date on which he pays off the amount of the prior mortgage. The right also to be re-imbursed accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which under the decree exists on them. It is clear, as already remarked, that this right could

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not have accrued when the original mortgage became payable. The second mortgagee who discharges the prior mortgage and the decree obtained on that mortgage is not an assignee of the decree and he is not entitled to execute the decree. This was held by their Lordships of the Privy Council in the case of *Gopi Narain Khanna* v. *Baneedhar* (1). In view of this ruling of their Lordships of the Privy Council the court of first instance was right when, on the 1st of August, 1914, it refused the application of the present plaintiff for the making of a final decree in his favour in respect of the decree obtained by the first mortgagee. The lower court has relied upon the decision of the Judicial Commissioner of the Central Provinces in the case of *Nathu Ram* v. *Sheo Lal* (2). That ruling, no doubt, to a great extent supports the view of the learned Judge, but, with great deference, we are unable to follow it. It is impossible to hold that the right of the plaintiff accrued before he made any payment at all. In that ruling the learned Judge seems to have assumed that the plaintiff was the assignee of the decree. Under section 74 of the Transfer of Property Act he no doubt acquired the rights and powers of the mortgagee whom he redeemed, but the fact of his redeeming the prior mortgage does not make him an assignee of the mortgage. His rights may be akin to those of an assignee, but he is not the actual assignee. If he had been the assignee of the mortgage and no suit had been brought on the basis of the mortgage by the prior mortgagee, he would have been bound to bring his suit to enforce that prior mortgage within the priod of limitation which was available to the prior mortgagee. But a suit like the present is not a suit to enforce the prior mortgage nor is it an application for the execution of the decree obtained on the basis of the prior mortgage. This is conceded by the learned vakil for the respondents. But he urges that the plaintiff is seeking to extend the period of limitation. We fail to see how the present plaintiff can be said to be seeking to extend the period of limitation, which is not the period of limitation available to the first mortgagee. He is entitled to bring his suit within the period of limitation

(1) (1905) I. L. R., 27 All., 525 (2) (1917) 42 Indian Cases, 796.

which would govern the claim to recover money paid by him for the defendants or to enforce a charge which he has acquired on the property of the defendants. So far as the suit is a suit of this nature the claim is admittedly within time. If the suit were treated as a suit personally against the mortgagors the limitation would be three years from the date of payment. See article 61, schedule I, of the Limitation Act. If it is a suit to enforce a charge, as it obviously is, or for a declaration that he has a charge on the property, it is still within time. In this view no question of acknowledgment arises. There are several other questions involved in the case which the court of first instance did not try in consequence of its decision on the question of limitation. We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance with instructions to restore it to its original number in the register and to try and dispose of the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

Before Mr. Justice Walsh and Mr. Justice Ryves.

SHIKRI PRASAD (APPLICANT) *v.* AZIZ ALI AND OTHERS (OPPOSITE PARTIES).*

1921
July, 18

Act No. V of 1920 (*Provincial Insolvency Act*) *sections* 4, 5 *and* 75 (2)—*Insolvency—Procedure—Appeal—Question of title—Act No. IV of* 1882 (*Transfer of Property Act*), *section* 53.

A court exercising insolvency jurisdiction under Act No. V of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act. But it also has to decide all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act, 1882.

Where a decision on a question of title whether certain property was still the property of the insolvent or had been the subject of a valid alienation was pronounced after the coming into operation of Act No. V of 1920, although the action of the receiver which gave rise to the question was taken before, it was *held* that an appeal lay under the new Act as a matter of right at the instance of a creditor adversely affected by the decision.

THE facts of this case sufficiently appear from the judgment of the Court.

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* First Appeal No. 15 of 1921, from an order of H. J. Colvin, District Judge of Saharanpur, dated the 14th of May, 1920.

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SHIKAI PRASAD v. AZIZ ALI.

Mr. *Nihal Chand*, for the appellant.

Dr. *M. L. Agarwala*, for the respondents.

WALSH and WALLACH, JJ. :—This order cannot stand. The learned Judge has totally misconceived the position. The original application was by the insolvent complaining under the old Act, which is now repealed, against an act of the receiver. The act of the receiver was an act attaching some very valuable property which the receiver in a very clear, closely reasoned, and strong report has come to the conclusion had been sold by the insolvent some three years before the insolvency, merely with intent to defraud and delay his creditors, or, as the receiver says, to hoodwink his creditors and save the property. The District Judge has held, rightly, that it does not come within any of the express provisions of the insolvency law, and he has gone on to hold, erroneously, that a transaction cannot be attacked, under the provisions of the Transfer of Property Act or under general provisions of the law, in the Insolvency Court. Here he is wrong. The Insolvency Court has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act, where, for example, a trustee is given a higher title than the original debtor. But the Insolvency Court also has to apply, and to decide, all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act. That is one reason why the administration of insolvency is so onerous and imposes a very heavy burden on the district courts. If the receiver is right in fact, clearly this transaction was void under section 53 of the Transfer of Property Act, and the property attached by the receiver ought to be distributed as part of the estate among the creditors. But the receiver is not a judicial officer, and it is not sufficient for the Judge merely to refuse to disagree with him. We are of opinion in this case that, owing to his having considered the question of law to be a final bar, he has not applied his mind at all to the question of fact. He has only said that the receiver's reasoning is sound enough. There ought to be a full inquiry between the receiver and the creditor on one hand, and the debtor and his family on the other, as to the *bona fides* of this transaction.

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Whether you call it summary or not, it ought to follow the ordinary course of a suit. In the main the provisions of the Code of Civil Procedure are applicable to such inquiry, and there ought to be sworn testimony and the same care used with regard to documents, and the admission or rejection of documentary evidence, as in a suit. We remit the case to the District Judge to hear and decide the application as though it were a question of title involving matters of law and fact under section 4 of the new Act, which was not in force when he adjudicated. He must allow the respective parties to adduce any material evidence they may be advised to do.

Mr. *Agarwala* on behalf of the respondent has very forcibly urged upon us the contention that we ought to dismiss this appeal on the ground that no appeal lay. Probably no appeal did lie under the old Act, under which this proceeding was commenced and decided At any rate no appeal lay without the permission of the court and no permission has been given. The new Act of 1920 became law on the 25th of February, 1920. This decision was passed on the 5th of May, 1920. The appellant had to consider at the date when the decision was passed what his right of appeal was, if any. The old Act of 1907 had been repealed and the only Act in force was the Act of 1920. Section 75, sub-section (2), of the Act of 1920 gives a right of appeal to any creditor against a decision of the District Court of the nature specified in schedule I of that Act. Amongst the decisions specified in schedule I of that Act is the decision under section 4 of a question of title. We are clearly of opinion that the decision which is appealed against was a decision on a question of title within the meaning of section 4, although section 4 did not exist when the case arose, and being such a decision it was one against which the creditor had a right of appeal by the only Act in force at the time when the appeal was filed. We therefore remit the case as above mentioned, and on the whole justice will be done by allowing costs to abide the result.

Appeal decreed and cause remanded.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

1921 July, 19.

RAM SUBHAG SINGH AND OTHERS (PLAINTIFFS) v. DIP NARAIN SINGH (DEFENDANT.) *

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111 and 233 (k)—Partition—Question of title raised by suit in Civil Court pending partition in Revenue Court.

No suit will lie in a Civil Court at the instance of a party to partition proceeding pending in a Court of Revenue for the decision of a question of title concerning the property to which proceedings relate, such question not having been raised in the partition proceedings. *Ganesh Tewari* v. *Salik Pande* (1) followed.

THIS was an appeal in a suit filed by a party to certain partition proceedings pending in a Court of Revenue for the decision of a question of title relating to the property under partition. The principal defence to the suit was that it was barred by reason of section 233 (*k*) of the United Provinces Land Revenue Act, 1901, and the existence of the partition proceedings. The appeal originally came before a single Judge, who referred it to a Bench by the following order, in which the facts are stated at length :—

STUART, J.:—The plaintiffs sued for possession as proprietors of a certain plot of land. The trial court decreed the claim. The learned District Judge in appeal decided on the 29th of October, 1918, that the plot of land in question was part of certain property which was in process of being partitioned by a Revenue Court under the provisions of Chapter VII, Local Act III of 1901, and that in these circumstances the suit was barred under the provision of section 233 (*k*) of the same Act. As this decision of the learned District Judge did not show whether the plaintiffs were recorded co-sharers or parties to the partition proceedings I remanded the case to his successor for a finding upon that point. His successor has now sent back the case with findings on the remitted issues and on these findings, which cannot be traversed as they are findings of fact, it appears that the plaintiffs are recorded co-sharers and that they are parties to those proceedings. The learned District Judge added, however, that the proceedings in question were suspended

* Second Appeal No 79 of 1919, from a decree of Babu Bihari Lal, District Judge of Azamgarh, dated the 29th of October, 1918, reversing a decree of Shanker Lal, Additional Munsif of Azamgarh, dated the 29th of June, 1917.

(1) (1914) 12 A. L. J., 949.

owing to time having been given to a third party to establish his proprietary title. From these proceedings which he has sent with the record, it appears that the matter is not exactly suspended, but it is to be noted that the partition proceedings were commenced on the 8th of January, 1913, that they have not terminated yet and that there is no prospect of a final determination for some time to come. It is certainly remarkable that any Revenue Court should be able to spin out such a matter for such a period. Unfortunately the incident does not stand alone, particularly in the eastern districts. But the point now arises—Can it be said that because the same matter is before a Revenue Court conducting partition proceedings the present suit is barred under the provisions of section 233 (*k*)? Can it be described correctly as a suit for partition or union of mahals? If the partition proceedings had been completed, the decision of the Bench in *Nathi Mal* v. *Tej Singh* (1) would have application and that decision would settle the question. It would then be held that this suit was barred. But it is to be noted that so far there has been no final order of a partition court. There will probably be such an order, but it cannot be asserted with certainty that there will be one. The Collector might in the end refuse to sanction the partition. In these circumstances the plaintiffs may be left, if the view of the learned District Judge who decided the appeal be upheld, with their suit dismissed and with no opportunity of re-opening the matter, and with no determination of the point by the Revenue Court. It is true that in a single Judge decision of this Court—*Ganesh Tewari* v. *Salik Pande* (2)—PIGGOTT, J., laid down that the mere fact that partition proceedings had been instituted would prevent such a suit as this being brought in a Civil Court, even if these partition proceedings had not terminated. But apart from the fact that it does not appear that the possibility of the partition proceedings failing to determine the point was brought to the notice of PIGGOTT, J., the point seems of sufficient importance to require the decision of a Bench rather than of a single Judge. I, therefore, refer the decision of this appeal to a Bench of two Judges.

(1) (1907) I. L. R., 29 All., 604. (2) (1914) 12 A. L. J., 949.

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RAM SUBHAG SINGH v. DIP NARAIN SINGH.

On the appeal coming on for hearing before a Division Bench

Dr. *Surendra Nath Sen*, for the appellants.

Pandit *Brij Mohan Vyas*, for the respondent.

LINDSAY and STUART, JJ. :—This case has been referred to a Bench of two Judges for the purpose of having it decided whether or not the suit brought by the plaintiffs was maintainable in the Civil Court. The suit was a suit for possession of 4 bighas odd of land and there was coupled with the claim for possession a claim for damages by way of mesne profits.

This suit was instituted in the year 1916.

It is admitted that at the time the suit was put into the Civil Court there was pending a partition between the parties which was being carried out under the provisions of chapter VII of the Land Revenue Act. It is also an admitted fact that the question of proprietary title which was set up in the suit, out of which this appeal has arisen, was not set up in the partition court. The question, therefore, is whether in these circumstances the Civil Court was competent to entertain the suit for possession which was based upon the claim of proprietary title.

In the referring order attention is drawn to the decision of PIGGOTT, J., in *Ganesh Tewari* v. *Salik Pande* (1). If the view of the law taken by the learned Judge in that case is accepted, then there can be no question that this suit was not maintainable in a Civil Court. In our opinion the view of the law laid down in the judgment in question is correct and is supported by authorities of this Court, of which we need only refer to the case of *Nathi Mal* v. *Tej Singh* (2) and the Full Bench ruling in *Muhammad Sadiq* v. *Laute Ram* (3).

The case of *Nathi Mal* v. *Tej Singh* (2) was one in which the plaintiffs instituted the suit while the partition proceedings were pending in the Revenue Court. By the time the case came to be decided in appeal the partition had been concluded. The learned Judges, however, decided the question as to whether the suit was maintainable at the time it was instituted and they were of opinion that inasmuch as partition proceedings had

(1) (1914) 12 A. L. J., 949 (2) (1907) I. L. R., 29 All., 4.

(3) (1901) I. L. R., 23 All., 291.

begun in a competent Revenue Court regarding the property in suit, it was not open to the plaintiffs to come to the Civil Court and raise there a question of proprietary title which it was open to them to raise before the court dealing with the partition. The fact that the partition proceedings are carried to a completion before the appellate court is able to deliver its judgment does not seem to us to affect the case. The question whether a suit is maintainable or not is a matter to be considered in connection with the circumstances which exist at the time when the suit is brought into the court. For these reasons, therefore, we hold that the view of the law taken in *Ganesh Tewari* v. *Salik Pande* (1) is correct and that the present suit was not maintainable and was liable to dismissal. The appeal, therefore, fails and is dismissed with costs to the respondents.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

MUHAMMAD HANIF AND OTHERS (DEFENDANTS) v. ISHRI PRASAD (PLAINTIFF).*

1921 *June*, 30.

Mortgage—Suit for recovery of the mortgage money—Dispossession of mortgagee from part of the mortgaged property—Acquiescence of mortgagee—Ultimate dispossession from the remainder—Limitation—Terminus a quo.

Plaintiff in 1894, took a usufructuary mortgage of eleven villages, knowing at the time that nine of the villages were subject to a prior mortgage. He either never obtained possession of these nine villages or he lost possession in 1897, when they were sold in execution of a decree on the prior mortgage. He, however, acquiesced in the situation and apparently remained content with the possession of the remaining two villages as security for the money advanced by him. In 1916 plaintiff was dispossessed of the two remaining villages, and thereafter instituted a suit for the recovery of the mortgage money.

Held that in the circumstances the suit was not barred by limitation, the plaintiff's cause of action having arisen only on his dispossession from the last two villages.

THE facts of this case are fully stated in the judgment of the Court,

Maulvi *Iqbal Ahmad*, for the appellants.

Babu *Lalit Mohan Banerji*, for the respondents.

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* First Appeal No. 58 of 1919, from a decree of Raj Bihari Lal, Subordinate Judge of Azamgarh, dated the 20th of November, 1918.

(1) (1914) 12 A. L. J., 949.

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MUHAMMAD HANIF v. ISHRI PRASAD

MEARS, C. J., and BANERJI, J. :—This and the connected appeal No. 70 of 1919 arise out of a suit brought by the plaintiff respondent to recover money alleged to be due upon a *zar-i-peshgi* lease executed by the defendants in favour of Baldeo Prasad, father of the plaintiff, on the 12th of December, 1894. The property comprised in the *zar-i-peshgi* lease, which is in reality a usufructuary mortgage, consisted of 11 villages, 9 of which were subject to a prior mortgage, on which a decree had been obtained in 1893. According to the terms of the usufructuary mortgage, the mortgagee was to remain in possession of the 11 villages and the mortgage could be redeemed upon payment in the month of *Jeth* of any year of the principal amount borrowed. The principal amount secured by the mortgage was Rs. 9,000 and the plaintiff claims that amount together with interest, on the allegation that he was dispossessed in May, 1916, from two of the villages included in the mortgage, of which he was in possession Various pleas were raised by the defendants, but we need not refer to all of them, as we propose to deal with such of the pleas as have been put forward before us in the two appeals. The court below has made a decree in favour of the plaintiff for Rs. 4,000 and interest, it being of opinion that out of the Rs. 9,000 mentioned in the mortgage-deed, the payment of Rs. 4,000 only had been proved.

The first contention raised before us in this appeal, which has been preferred by three of the defendants only, is that the payment of consideration for the document in suit has not been proved. It must be borne in mind that the execution of the document has been fully established by the evidence, and on this point there is no dispute. In the document itself the receipt of the consideration was acknowledged and at the time of registration it was admitted that consideration had been paid. Therefore, on the face of the document and on the face of the admission made before the Sub-Registrar there was sufficient evidence of payment of consideration. However, it appears that Badleo Prasad, father of the plaintiff, who was the original mortgagee, stated in a deposition made by him in 1898 in the Revenue Court, that the amount which he had paid was entered in his account books and the inference from the whole of his

statement is that the full amount of consideration was not paid. In the present suit one of the witnesses for the defendants, Bakhshi Khan, stated that in his presence Rs. 4,000 was paid. He also stated that other sums had been paid, but not in his presence. Therefore, so far as the amount of actual payment is concerned, there is only the evidence of Bakhshi Khan as to the payment of Rs 4,000. The court below has believed the statement of Bakhshi Khan, and we see no reason to disbelieve it. If he had been a false witness and if he had been inclined to give false evidence on behalf of the plaintiff, he would in all probability have stated that the whole of the Rs. 9,000 had been paid in his presence. So far, therefore, as his evidence is concerned, it is reliable and proves the payment of Rs. 4,000. This payment is also supported by the admissions to which we have already referred. The respondent has not preferred any objection as regards the balance of the consideration and has submitted to the finding of the court below as to the payment of Rs. 4,000 only. So far, therefore, as the question of consideration is concerned, we are in full agreement with the decision of the court below and must repel the plea advanced on behalf of the appellants.

The next contention on behalf of the appellants in this case is that Jasodanand, who purported to have signed the mortgage-deed for them as their general attorney, had no authority to execute a document like the present on their behalf under the power of attorney which he held from the defendants. The court below was of opinion that that power of attorney authorized Jasodanand to execute documents of this nature on behalf of the appellants. We have considered the terms of the power of attorney and we find that the authority given by that document to the attorney appointed by the appellants was an authority to produce for registration and obtain registration of ordinary leases, *zar-i-peshgi* leases, leases granted to tenants and similar documents executed by the principals. There is no authority in the document as we read it, empowering the attorney to execute a lease or a *zar-i-peshgi* lease on behalf of the appellants. We have, therefore, to consider whether the act of Jasodanand in signing the mortgage-deed on behalf of the appellants was ratified by the

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appellants. The mortgage, as we have said above, was executed in 1894. It has been proved that until 1916 the mortgagee was in possession of two of the mortgaged villages. It is thus manifest that for this long period extending from 1894 to the date of the institution of the present suit, the mortgage was never repudiated by the appellants. It was acquiesced in, and at no time did the appellants dispute its validity. It was contended on behalf of the appellants that the mortgage-deed was *ab initio* void inasmuch as it had not been signed by the appellants themselves as required by section 59 of the Transfer of Property Act. On the face of it, however, the document was signed by a person who professed to be the general agent of the appellants. If in fact he had been the general attorney of the appellants empowered to execute a *zar-i-peshgi* lease on their behalf, the signature of the appellants on the *zar-i-peshgi* lease which is the mortgage-deed in the present case, would have been a sufficient signature so as to bind the appellants. Therefore, when the document was executed it was not on the face of it a void or invalid document. In the subsequent contest which has arisen in the present suit, the question has been raised that Jasodanand had no authority to execute the document. As we have already stated, upon a true construction of the power of attorney executed in his favour he was not authorized to grant a *zar-i-peshgi* lease, but we have the fact that ever since the date of the lease, of which the appellants had perfect knowledge, the lease has been allowed to be acted upon, and this, in our opinion, amounts to a ratification of the act of Jasodanand. This being so, it is not open to the appellants now to contend that they are not bound by the document which Jasodanand signed for them.

The third question raised, which was argued at some length before us, was the question of limitation. The document on which the claim is based provides, amongst other things, that if the mortgagee is dispossessed or does not obtain possession, he would be entitled to sue for his money with interest. On the strength of this provision it is contended that if the mortgagee did not obtain possession of a part of the mortgaged property in 1894 or was dispossessed in 1897, when nine of the villages comprised in the mortgage were sold by auction in execution of the decree obtained

on a prior mortgage in 1893 by Mahadeo, the brother of Baldeo Prasad, the right of Baldeo Prasad the mortgagee to sue for his money arose either in 1894 or in 1897, and that as the present suit was instituted after the expiry of twelve years from those years, it is time-barred. On the other hand, it is urged that possession of the nine villages had never been obtained by the mortgagee; that he had obtained possession of the two villages which had not been sold, namely, the villages of Lado and Bijarwa; that he remained in possession till 1916, and that therefore there was a waiver of the right of the mortgagee to claim his money, and that it was only when he was subsequently dispossessed that his right to recover the money accrued. We think that the latter contention is well founded. The evidence proves that the mortgagee obtained possession of the two villages mentioned above from the time of the execution of the mortgage in 1894. A number of revenue receipts have been produced to show that he paid Government revenue for these two villages even before the auction sale in 1897. He has also given evidence to prove that he was in actual possession until 1916 and that it was only in that year that he was dispossessed. On this point we agree with the finding of the court below. What happened then is this. The mortgagee obtained a mortgage of eleven villages. At the time he took the mortgage he was aware of the fact that there was a prior mortgage on nine of the eleven villages, for the sale of which a decree had been passed. When these nine villages were sold, the mortgagee was content to take as security for the money advanced by him the remaining two villages which had remained unsold and he continued in possession of those two villages. He acquiesced in the fact of the nine villages going out of his possession, and the result of this was that the mortgage affected only two of the mortgaged villages and that he was content to regard those two villages as the property which was security for the money advanced by him. This being the case, it was only when he was dispossessed from these two villages that his right to sue for his money accrued. Considerable reliance was placed upon the decision of the majority of the Full Bench in the case of *Gaya Din* v. *Jhumman Lal* (1).

(1) (1918) I. L. R., 37 All., 409.

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We think that the circumstances of that case may be differentiated from those of the present case. That was a case of a simple mortgage in which there was a clause authorizing the creditor to sue for his money in case of default of payment. The present case is a case of a usufructuary mortgage under which the mortgagee was to remain in possession. It was only if he was dispossessed that his right to recover the money arose. He was content to relinquish his right to a portion of the security afforded by the mortgage, and he accepted the remainder of the mortgaged property as his security and he remained in possession of that portion. The mortgagee in this case, as we have said above, acquiesced in the sale of nine of the villages which were mortgaged and upon which there was a prior charge. He, therefore, substituted for the mortgage of eleven villages a mortgage of two villages only, and, so long as he remained in possession of those two villages, he could not have sued for the recovery of his money. It may be that in 1894 or 1897 he might have brought a suit for his money if he had so chosen, but, as he did not repudiate the entire mortgage at that time but remained content with the security of two villages only and remained in possession of those two villages, he could not, unless he was dispossessed from those two villages, put forward a claim for his money. It was only when he was dispossessed from those two villages that his right to recover the money accrued. In this view the suit was within time, having been brought within twelve years of the date of his dispossession in 1916. The court below, we think, came to a right conclusion on this point. No other question is argued before us. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

1921
July, 25.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

MUHAMMAD YAKUB AND ANOTHER (DEFENDANTS) *v* KANHAI LAL AND ANOTHER (PLAINTIFFS) *.

Pre-emption—Muhammadan law—Pre-emptor and vendee both belonging to same category of pre-emptors.

According to the Muhammadan law of pre-emption, where both the vendee and the pre-emptor are in the same category of pre-emptors, the result is, not the dismissal of the suit, but that the property must be shared equally by the two claimants *Amir Hasan* v. *Rahim Bakhsh* (1) and *Abdullah* v. *Amanat-ullah* (2) followed. *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3) dissented from. *Baldeo* v *Badri Nath* (4) not followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Nihal Chand*, for the appellants.

Babu *Priya Nath Banerji*, for the respondents.

TUDBALL and SULAIMAN, JJ.:—This is a defendant's appeal arising out of a suit for pre-emption of a house sold by a Hindu vendor. The claim was based on an alleged custom embodying the rules of Muhammadan law. The plaintiffs are *shafi khalit* as well as *shafi-jar* of the vendor; and the vendees are *shafi khalit*. Thus the plaintiffs and the vendees both come in the second class, and the plaintiffs also come in the third class of pre-emptors. The court of first instance framed seven issues, but dismissed the claim on the sole ground that both the plaintiffs and the vendees being of equal status the suit was not maintainable. The lower appellate court, relying on the case of *Amir Hasan* v. *Rahim Bakhsh* (1), was of opinion that that ground was insufficient for the dismissal of the whole suit, and remanded the case for disposal of the other issues. The defendants have come up in appeal to this Court and challenge the finding of the lower appellate court. The plaintiffs have filed cross-objections and urge that they have a preferential right as against the defendants.

The cross-objections can be disposed of at once. The plaintiffs and the vendees both come in the second class as *shafi khalit*. The fact that the plaintiffs are also *shafi-jar* and come in the third class cannot give them any preferential right over the

* First Appeal No. 28 of 1921, from an order of Partap Singh, Additional Judge of Bareilly, dated the 9th of November, 1920.

(1) (1897) I. L. R., 19 All., 466.
(2) (1899) I. L. R., 21 All., 292.
(3) (1878) I. L. R., 4 Calc., 831.
(4) (1909) I. L. R., 31 All., 519.

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defendants. The cross-objections are, therefore, without any force, and the whole suit cannot be decreed.

As to the appeal the position is this. Neither of the courts below have found whether any custom of pre-emption exists or what that custom is. We do not know whether under such a custom the whole of the Muhammadan law is applicable or not. As the incidents of this alleged custom have not yet been found, we must assume in favour of the plaintiffs that the whole of the Muhammadan law applies, though of course when facts have to be gone into this may not necessarily be the case.

In two very old cases, *viz*, *Baboo Moheshee Lal* v. *G. Christian* (1) and *Teeka Dharee Singh* v. *Mohur Singh* (2), it was held that under the Muhammadan law the right of pre-emption did not arise in case of a purchase by a person who is himself a pre-emptor of the same class as the plaintiff. No original authorities appear to have been cited before the court. These cases were followed in the Full Bench case of *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (3), where a passage bearing on this point in the *Hedaya*, Book 38, Chapter I, was explained away by saying that it had been misunderstood.

In the case of *Amir Hasan* v. *Rahim Bakhsh* (4) this Court, having had the advantage of seeing some original authorities cited by Mr. *Karamat Husain*, counsel for the appellant, went into the question at great length and dissented from the Calcutta view. This case was followed and its principle was even extended in the case of *Abdullah* v. *Amanat-ullah* (5).

The disputed passage in the *Hedaya* is certainly ambiguous, and, therefore, inconclusive. But the other authorities quoted in *Amir Hasan's* case, specially the Radd-ul-Mukhtar (also known as "Shami") and the Fatawa Alamgiri, both of which are most exhaustive and authoritative works on Hanafi Law, leave no doubt in the matter. Two more texts in the Fatawa Alamgiri, which are not quoted in that judgment, are clearer still. In volume IV, Chapter 2, it is quoted from Mohit Sarkhasi that if there are four co-sharers in a house and one co-sharer

(1) (1866) 6 W. R., C. R., 250. (3) (1878) I. L. R., 4 Calc., 881.

(2) (1867) 7 W. R., C. R., 260. (4) (1897) I. L. R., 19 All., 466.

(5) (1899) I. L. R., 21 All., 232.

purchases the shares of two co-sharers, one after the other, and then the fourth co-sharer appears, he can share as pre-emptor in both the shares. In volume IV, Chapter 6, it is stated on the authority of Sharah Tahtawi that if a person who is a pre-emptor purchases a house and then comes another person who, like him, is a pre-emptor, the Qazi shall decree half the house in his favour; if, however, the second pre-emptor has a superior status, then the whole house will be decreed to him, but if he is of an inferior status, then he can get nothing by pre-emption.

The prevention of the inconvenience which may result from the introduction of a disagreeable stranger is not the only object of the rule of pre-emption, as was supposed by GARTH, C. J., in *Lalla Nowbut Lall* v. *Lalla Jewan Lall* (1). The rule is also based on the ground that all pre-emptors having equal rights against a stranger, their rights are the same *inter se*, and one pre-emptor cannot steal a march on the others by taking a purchase behind their backs.

The court of first instance has relied on the case of *Baldeo* v. *Badri Nath* (2), where the plaintiff and the defendant having been found to be of equal status the whole suit was dismissed. A perusal of the notes of argument and the judgment in that case will, however, show that the point which arises in this case was neither raised nor argued there. The attention of the learned Judges was not even drawn to the previous case of *Amir Hasan* v. *Rahim Bakhsh* (3). They only decided the point that was raised before them, and cannot by implication be taken to have dissented from the well-considered view expressed in the earlier case.

We think that on the authorities, which are in conformity with the enunciations of Muhammadan jurists, the view of the court below is correct. We accordingly dismiss the appeal with costs.

The cross-objections are likewise dismissed with costs.

Appeal dismissed.

(1) (1878) I. L. R., 4 Calc., 831. (2) (1903) I. L. R., 31 All., 519.

(3) (1897) I. L. R., 19 All., 466

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July, 26.

Before Mr. Justice Tudball and Mr. Justice Sulaiman

CHANDAR LAL SAH AND ANOTHER (OPPOSITE PARTIES) *v.* THE COLLECTOR OF BAREILLY (APPLICANT).*

Act No. I of 1894 (Land Acquisition Act), sections 25, 26, 27 and 54—Reference to District Judge—Powers and duty of Judge in dealing with an award made by the Collector—Review of his award by Judge—Appeal

A District Judge on a reference made to him under the Land Acquisition Act, 1894, cannot award a less amount than that awarded by the Collector, even though the Collector has by mistake awarded to the claimant a larger sum than he is entitled to. *Ezra* v. *Secretary of State for India* (1) referred to.

Where the District Judge, having confirmed the Collector's award, subsequently, on an application made by the Government Pleader, reviewed his award and made a fresh award reducing the amount awarded by the Collector. *Held* that an appeal would lie against the revised award under section 54 of the Act.

THE facts of this case are fully set forth in the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Mr. *R Malcomson* and Babu *Lalit Mohan Banerji*, for the respondent.

TUDBALL and SULAIMAN, JJ. :—F. A. No. 160 of 1919 and Revision No 61 of 1919 have arisen out of certain proceedings under the Land Acquisition Act which were taken in the court of the District Judge of Bareilly. Both the revision and the appeal have been filed as a matter of precaution, as the appellants were in doubt as to which was the proper course to take in the circumstance of the case. The facts are as follows :—Certain land was notified under the Land Acquisition Act; notices were issued; some of the land had standing upon it certain trees; a valuation was made by the Land Acquisition Officer in which a sum of Rs. 184 was entered as the value of the timber of the trees. Before the Collector made any award, permission was given to the owner of the land to cut and remove these trees. He did cut and remove the trees. After this had been done the Collector made an award. The appellants before us, or rather their predecessor in title, was not satisfied with the award and asked for a reference to the

*First Appeal No. 160 of 1919, from a decree of H. E. Holme, District Judge of Bareilly, dated the 25th of January, 1919.

(1) (1905) I. L. R., 32 Calc., 605.

court of the District Judge. Under section 19 the reference was made. An award was made by the Judge, an appeal was preferred to this Court to set aside that award and the case was remanded to the District Judge again. On the remand, on the 23rd of July, 1917, the District Judge made, what we presume he would call, an award under the Act. Now what he did actually do was to give certain reasons and then pass the following order :—

"For the above reasons I confirm the award of the Collector and order that a decree in accordance therewith be drawn up as laid down in sections 26 and 27 of the Land Acquisition Act."

The Judge's office, instead of drawing up a formal award in accordance with sections 26 and 27, drew up the following order :—

"It is ordered that the award of the Collector of Bareilly be confirmed, that a decree be drawn up as laid down in sections 26 and 27 of the Land Acquisition Act, that the petitioner do pay all costs of these proceedings, except those costs regarding which orders have been passed by the Hon'ble High Court, and it is further ordered that the opposite party do pay to the Collector of Bareilly the sum of Rs. 55-15, the amount of costs incurred by him on account of this application."

Section 26 of the Act says :—

"Every award under this part shall be in writing signed by the Judge and shall specify the amount awarded under clause first of sub-section (1) of section 23 and also the amounts (if any) respectively awarded under each of the other clauses of the same sub-section together with the grounds of awarding each of the said amounts."

It is quite obvious that the learned District Judge ought himself to have drawn up his award giving all these details, which could have been formally embodied in a formal decree if necessary. However, the sum which the Collector had awarded was Rs. 470-11-2. This decree or formal order was drawn up and signed by the Judge on the 1st of August, 1917. On the 4th of August, 1917, the Government Pleader on behalf of the Collector of Bareilly filed a petition as follows :—

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"In the above case it is submitted that the objector has cut down the trees standing on plot no. 319. It is, therefore, prayed that out of the amount of compensation Rs. 184, the value of the trees, may not be awarded to the objector."

In view of the fact that, however informal his order, the Judge had actually allowed to the claimant a sum of Rs. 470-11-2 as compensation, this application was clearly one made on behalf of the Collector to the Court to reconsider his award and to deduct therefrom the sum of Rs. 184 on the ground that the trees had been cut and removed by the plaintiff. It is not clear by any means what steps were taken on this application, *i.e.*, whether notice was or was not issued and whether or not it was served. Be that as it may, the matter did come up again before the Judge on the 25th of January, 1919, when both parties were represented. On that date the Judge passed the following order :—

"I have amended the decree to show that Rs. 184 awarded by the Collector for trees on no. 319, now admittedly cut down and sold for his own profit by the applicant (see my judgment, dated the 23rd of July, 1917), are not to be paid to the applicant under my award. Obviously he cannot take and sell the trees and keep the sale proceeds and also be given compensation for them. The Government Pleader's application is accordingly allowed and the objection dismissed. No order as to costs, as the matter should have been brought to my notice before the original decree was put before me for signature." It is on the basis of this that a formal order was drawn up which sets forth as follows :—

"It is ordered that the award of the Collector of Bareilly be confirmed, that a decree be drawn up in accordance with sections 26 and 27 of the Land Acquisition Act, that the petitioner do pay all costs of these proceedings except those costs regarding which orders have been passed by the Hon'ble High Court."

Then follows a calculation :—

	Rs	a.	p.
"Compensation of the Collector of Bareilly	286	11	2
Compensation for trees..	204	0	0
Trees on no. 319	184	0	0

Deducting one from the other, there is a balance of Rs. 20, by adding which makes the total Rs. 287-11-2."

It, therefore, comes to this that on the 25th of January, 1919, the District Judge made a fresh award altering his former award. It is from this last award that an appeal has been preferred. A preliminary objection is taken that no appeal lies, and our attention has been called to the rulings of this Court in *Raghunath Das* v. *Raj Kumar* (1), *Hasan Shah* v. *Sheo Prasad* (2) and *Suhadeo Gir* v. *Deo Dutt Misir* (3). The present case is one under the Land Acquisition Act and not an ordinary suit and those rulings have no application to the present case.

Section 54 of the Act is the only section which gives a right of appeal. That lays down:—

"Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees an appeal shall lie to the appellate court from an award or any part of an award of the first court in any proceedings under this Act."

Section 53 applies the provisions of the Code of Civil Procedure so far as they are not inconsistent with anything contained in the Act to all proceedings before the District Court.

As we read the proceedings in the present case, it seems to us clear that if the first order of the Judge, dated the 23rd of July, 1917, be taken as his original award, he was clearly asked to review that award and he did review it in the light of certain facts which were brought to his notice and he subsequently passed a fresh award on the 25th of January, 1919. It is true that in his order of that date he used the words:—"I have amended the decree to show, etc." What he passes under the Land Acquisition Act is not a decree but an award, and it is from his award that an appeal lies under section 54, and, as we read that section, an appeal will lie from any and every award made by the District Judge in proceedings under the Act. We are, therefore, of opinion that an appeal does lie from this order of the Judge, dated the 25th of January, 1919, it being an award under the Act. It was unnecessary for the appellant to have filed any revision, assuming that any revision could be filed in proceedings under this Act, a point which we do not decide.

(1) (1885) I. L. R., 7 All., 876. (2) (1893) I. L. R., 15 All., 121.

(3) (1915) I. L. R., 37 All., 323.

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We next have to see whether the award of the District Judge is one that can be maintained. The nature of the proceedings in a Land Acquisition Court has been very clearly set out by their Lordships of the Privy Council in *Ezra* v. *Secretary of State for India* (1). The Land Acquisition Officer makes any inquiry that he may deem fit, to ascertain and to fix the amount which he will offer to the owner of the property which has been acquired under the Act. The owner of the property may or may not accept the award. If he is dissatisfied with it he has a right of reference to the District Court. Sections 18 and onward in Part III of the Act govern the proceedings in the court of the District Judge. Section 25 lays down clearly that "when the applicant has made a claim to compensation, the amount awarded to him by the court shall not exceed the amount so claimed by him or be less than the amount awarded by the Collector under section 11." It is, therefore, obvious that the District Judge in the present case could not possibly award to the claimant less than the amount awarded by the Collector. It appears that the Collector in making his award had overlooked the fact that he had allowed certain trees to be cut and removed. He may or may not have made a mistake in this respect, but the fact remains that he did make an award of a certain sum which was not accepted by the present appellants. These latter were not concerned with the details of the Collector's award. They were concerned with the total sum offered to them and, in their opinion, it was too small. They accordingly asked for a reference. The reference was made and it is obvious under section 25 of the Act that, whatever the District Judge might care to award, he could not award less than the amount which the Collector had awarded. The District Court is not concerned with the errors made by the Collector in the course of his calculations. The order, therefore, passed by the District Judge on the 25th of January, 1919, and the award made by him thereunder are clearly illegal in view of the language of section 25 of the Act.

We, therefore, allow this appeal and set aside the award of the District Judge. The appellants will be entitled to

(1) (1905) I. L. R., 32 Calc. 605.

recover the full sum of Rs. 470-11-2 as compensation as originally allowed to them by the District Judge on the 27th of July, 1917. The appellants will be entitled to their costs of this appeal from the opposite party.

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Appeal allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Walsh and Mr Justice Wallach.

RAM LAL (PLAINTIFF) *v.* DEO RAJ (DEFENDANT)*

1921 *July*, 26.

Arbitration—Reference to arbitration made pending a reference of an appeal to the High Court under section 17 of the Ajmer Courts Regulation—Jurisdiction—Civil Procedure Code, 1908, schedule II, paragraph 1.

Held, on a reference to the High Court under section 17 of the Ajmer Courts Regulation, that it is open to the parties to an appeal to refer the matters in dispute between them to arbitration even after they have obtained an order of reference to the High Court.

THIS was a reference to the High Court under section 17 of the Ajmer Court Regulation. The facts which gave rise to the reference and the points as to which the decision of the High Court was asked are set forth in the following order of the Additional District Judge of Ajmer-Merwara:—

"In suit No. 11 of 1912 filed by the applicant in this reference, Ram Lal, for cancellation of a sale-deed against the opposite party Sheo Das, the Assistant Commissioner and Subordinate Judge, Ajmer, gave Ram Lal a decree. Sheo Das then filed an appeal in this Court and it was in due course dismissed. Sheo Das then obtained a reference to the Hon'ble the High Court at Allahabad. When this reference was pending Sheo Das died; moreover, parties filed an application in this Court asking this Court to refer this case to arbitration. The High Court accordingly was pleased to send back the case here, to bring the representative of Sheo Das on the record as well as to dispose of the arbitration petition. This Court accordingly decided to refer the case to arbitration. Ram Lal was evidently dissatisfied with the award and filed an objection, which was overruled. He then filed a Civil Suit, No. 42 of 1919, before the Subordinate Judge, Ajmer, seeking a declaratory decree to the effect that the order of this Court (*i.e.*, the District Judge)

* Civil Miscellaneous No. 246 of 1921.

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dated the 18th of August, 1916, referring the matter to arbitration was *ultra vires* and all proceedings subsequent thereto null and void. The defendant met the suit with the following pleas:—

(1) That the suit was not maintainable.

(2) That the court had no jurisdiction to entertain it.

(3) That the suit was barred by the rule of *res judicata*.

The Subordinate Judge framed, amongst others, the following issues:—

(a) Had the District Judge no jurisdiction to refer the matter to arbitration, in the course of proceedings under section 17 of the Ajmer Courts Regulation and are his proceedings *ultra vires*?

(b) Is this court competent to entertain the suit?

(c) Is the suit barred by the rule of *res judicata*?

The Subordinate Judge decided the first issue against Ram Lal, the second and third in his favour, and dismissed the suit.

There was an appeal to this Court and I confirmed the judgment and decree of the Subordinate Judge, not merely because I concurred with him in his finding on the first issue but also because I was of opinion that the question of want of jurisdiction or otherwise of this Court to deal with the petition of arbitration was not a question which could be re-agitated in a suit, and that the act of this Court in having placed the case in the hands of the arbitrators being unchallenged in the court above—in the court of the Hon'ble the Chief Commissioner—, became a finally decided matter between the parties and the parties were estopped from re-opening the case by a suit. On the question of merits *i.e.*, whether this Court could, properly speaking, refer the matter to arbitration when it had washed its hands of the case after dismissing the appeal, I was of opinion that the requirement of Schedule II, Rule 1, of the Code of Civil Procedure that a case can be referred to arbitration only before a judgment is pronounced, was fully satisfied, as the reference of this case to Allahabad re-opened it.

The questions, therefore, for decision of the Hon'ble the High Court are as follows :—

(*a*) Whether the reference of the case to the Hon'ble the High Court re-opened it, so as to confer on this court jurisdiction to refer the matter to arbitration.

(*b*) Did the decision of this court to refer the matter to arbitration estop the plaintiff Ram Lal from re-opening the question by a suit, *i.e.*, whether he was bound by the estoppel of *res judicata* ?

(*c*) Could a suit lie to obtain the declaration of the question whether the District Court or any other court had jurisdiction to dispose of the case in the way they did, *i.e.*, by referring to arbitration ?

The case is accordingly submitted under section 17 of the Ajmer Courts Regulation No. I of 1877 to the Hon'ble the High Court for judgment on the above points. My own opinion as to point (*a*) is in the affirmative and as to (*b*) and (*c*) in the negative."

The case was argued before the High Court by—

Mr. *Nihal Chand* and Babu *Surendra Nath Gupta*, for the applicant and Mr. *N. C. Vaish*, for the opposite party.

WALSH and WALLACH, JJ.:—We have no doubt as to what our answers to these questions should be.

To question (*a*) our answer is, to adopt a technical form, "No, it did not re-open it so as to confer jurisdiction to refer the matter to arbitration, but it did not affect it and the Ajmer Court had original jurisdiction to refer the matter to arbitration up till the final disposal of the suit."

We will state our reasons to remove any possible misunderstanding. The position presents itself in this way. The courts at Ajmer having *pro tanto* disposed of the litigation, there still remained the right of the parties to obtain a reference to the High Court. As appears by the referring order of 1916, the parties were within their rights in asking for a reference. The decision of the suit hinged, as is said in the referring order, upon the questions referred, and the Ajmer District Court expressed its own opinion as to what the answers of the questions should be. The Ajmer Act provides that the final decision shall

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be entered up in accordance with the decision of the High Court. In our view the best analogy is that of a preliminary decree and a final decree, and pending the final order of the Ajmer court on receiving the answers of the High Court to the reference, the suit was still, to adopt the language of the arbitration schedule in the Code of Civil Procedure, "pending judgment." While it was so pending and the High Court had not given its answers the parties agreed to refer the matter to arbitration. We are clearly of opinion that without the agreement of the parties the court could not have done so, because the court had already adopted the agreement of the parties to refer the matter to the Allahabad High Court, but it could allow the parties to override the reference on any terms they saw fit. It is no business of ours why they did so, but, as we have said, pending the final decision, while the matter was in the High Court, they agreed in the most explicit terms to settle the case amicably, to appoint a Barrister and a Pandit as arbitrators, to agree to what they decided and "never to go back upon it"—language which has a strange ring in 1921, though used as the foundation of an application to the court in 1916. The High Court was informed of this agreement and held its hand. On the 8th of August, 1916, in pursuance of the agreement, the District Judge ordered the matter to go to arbitration and directed the arbitrators to file their award by the 31st of August, 1916. In our opinion, in spite of the reference to the High Court, and not in any way because of the reference to the High Court, or because of anything which the High Court said, this was an arbitration in a suit in which the parties agreed that the matters between them should be referred to arbitration. By paragraph 1 of schedule II of the Code of Civil Procedure they were, at any time before judgment was pronounced, at liberty to apply to the court which ordered the order of reference. By paragraph 8 (2) of the same schedule the court, from the date of that order, was unable to deal with the matter in suit. It follows from this that our answer to question *(b)* must be "yes." The court was prevented by law from dealing with the matter in the suit thereafter, and *a fortiori* from dealing with it in another suit.

It follows that the answer to question *(c)* must be "No, no suit would lie."

Let the record go back to the Ajmer Court with this expression of our opinion.

Under section 20 of the Ajmer Courts Regulation the costs of this reference ought to be costs in the appeal out of which the reference arose. We recommend accordingly.

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APPELLATE CIVIL.

Before Mr Justice Tudball and Mr. Justice Sulaiman.

BHUP SINGH (DEFENDANT) *v.* JHAMMAN SINGH AND OTHERS (PLAINTIFFS) AND MUSAMMAT GURGA KUNWAR AND ANOTHER (DEFENDANTS).*

1921
July, 2

Hindu law—Hindu widow—Power of widow or other female limited owner to bind the estate—Legal necessity—Consent of reversioners.

When the alienation of the whole or part of the estate in possession of a Hindu widow or other such female owner has to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one

Where a widow or other such female owner of an estate borrows money for the purposes of the estate on a simple bond and subsequently gives the security of the estate for the payment of the debt, it is within her power to bind the estate.

Jugul Kishore v. *Jotendro Mohun Tagor* (1), *Debi Prosad Chowdhury* v. *Golap Bhagat* (2) and *Rangasami Gounden* v. *Nachiappa Gounden* (3) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Panna Lal*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

TUDBALL and SULAIMAN, JJ.:—This appeal is connected with F. A. 124 of 1919, as the mortgage which is the subject

* First Appeal No. 83 of 1919, from a decree of Muhammad Ali Ansat, subordinate Judge of Aligarh, dated the 8th of November, 1918.

(1) (1884) I. L. R., 10 Calc., 985. (2) (1918) I. L. R., 40 Calc., 721.

(3) (1918) 17 A. L. J., 596.

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matter of this suit is also the subject matter of the other suit. The facts may be briefly stated:—

One Bhagirath Singh died in the year 1880 leaving a widow Musammat Pran Kunwar. He had property, a 5 biswa share in mauza Mahmudpur Jamalpur, mahal Bhagirath Singh, and a 3 biswa 2 biswansi odd share in mahal Ghair Khastgaran of the same village. The present revenues of these two properties are Rs. 530-7-0 and Rs. 593-7-0. What the revenues were in the year 1880 is not stated. The widow Pran Kunwar remained in possession of the estate until the year 1886, when she died. She was succeeded by her daughter Musammat Durga Kunwar, who was the wife of one Balwant Singh and the mother of the defendant appellant before us, Bhup Singh. Musammat Durga Kunwar had two sons and two daughters. The elder son Ram Singh died in January, 1917. The present suit was instituted on the 19th day of August, 1918. It is a suit brought by mortgagees on the basis of a mortgage-deed, dated the 5th day of June, 1912, for a sum of Rs. 5,200. The property which had come to Musammat Durga Kunwar from her father Bhagirath Singh was hypothecated. The deed was executed by Durga Kunwar for herself and as guardian of her minor son Bhup Singh, who was then about 14 years of age, and also by Ram Singh, her elder son. Ram Singh apparently carried through the transaction. He presented the document for registration and he admitted execution and completion and the receipt of the consideration. The consideration consisted of the following items:—

(1) Rs. 4,600 due by the mortgagors to the mortgagees on the basis of a registered simple mortgage deed of the 19th day of November, 1910, which had been executed to secure a sum of Rs. 6,400.

(2) Rs. 100 taken by the executant to meet the expenses of the deed.

(3) Rs. 400 taken in cash, Rs. 275 of which was to redeem certain ornaments which had been pawned by the lady, and Rs. 125 to pay off certain parol debts.

The deed of the 19th day of November, 1910, was also executed in the same way by Musammat Durga Kunwar and Ram Singh. Bhup Singh pleaded in defence that his mother

had no right whatsoever to mortgage the estate, that she had no legal necessity for the loan and that he as the reversioner was not bound to pay. The suit was brought in the lifetime of Musammat Durga Kunwar. She was made a party to the suit. Bhup Singh was impleaded because on the 15th day of August, 1918, Musammat Durga Kunwar had executed a deed under which she gave up the whole of her life-estate in the property in favour of her son Bhup Singh. Musammat Durga Kunwar pleaded that she had relinquished her life-estate and put Bhup Singh in possession, she had now no longer any right in the property, that all the debts which she had incurred were her personal debts, and she generally supported her son. Musammat Bhagwati Kunwar merely pleaded that she had no interest whatsoever in the property and had been wrongly impleaded. The court below has decreed the plaintiff's suit in full and Bhup Singh has appealed. In the connected suit Bhup Singh came into court on the basis of the deed of relinquishment of the 15th of day August, 1918. Certain persons, Thakur Das and Gulab Singh, had obtained simple money decrees against Durga Kunwar, in execution of which they had attached some of the immovable property. The attachments were prior to the deed of relinquishment. Musammat Durga Kunwar, on the 17th day of November, 1896, had created a usufructuary mortgage of certain property in favour of the predecessor in title of Sannu Lal and Hira Lal. Bhup Singh asked the court for a declaration that the debt borrowed under the mortgage-deed of the 17th day of November, 1896, was the personal debt of Musammat Durga Kunwar and that by reason of the relinquishment all rights of the mortgagees under the mortgage had ceased to exist. He, therefore, asked to be placed in possession of the property as against those mortgagees. In regard to the mortgage-deed of the 5th day of June, 1912, he asked for a declaration that that mortgage was no longer binding upon the estate, inasmuch as Musammat Durga Kunwar had relinquished her rights. In regard to the attachments carried out in execution of the simple money decrees he asked for a declaration that they were no longer of any force and were void and ineffective against him. It will thus be seen that

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the mortgage-deed of the 5th day of June, 1912, was involved in the two cases. It is in the present appeal that we propose to deal with it at length. It is urged on behalf of the appellant that the plaintiffs have failed to prove legal necessity and that, therefore, they have failed to establish the fact that the mortgage is binding upon the estate: that the debts incurred by Musammat Durga Kunwar were all her personal debts. On these grounds it is urged that the suit ought to have been dismissed. Pending the decision of this appeal Musammat Durga Kunwar has died.

The point for our decision, therefore, is whether or not the debt due under this mortgage is one that is binding upon the estate and as such recoverable from it by the plaintiffs. It will be seen that the major part of the sum of Rs. 5,200 was a sum of Rs. 4,600 due on the mortgage-deed of 19th day November, 1910, which was executed by Musammat Durga Kunwar and Ram Singh, her elder son. An examination of this latter bond shows that it consisted of 5 items. The first item is of Rs. 475 due by Musammat Durga Kunwar on the basis of three simple unregistered bonds of the 18th day of July, 1909, and two, dated the 6th day of July, 1909. Of these three sums, that due under the bond of the 18th day of July, 1909, is said to have been borrowed for the payment of Government revenue, whereas the debts due on the two simple bonds were due on three old bonds of 1906. The second item is one of Rs. 650-6, also due on three simple unregistered bonds executed by Musammat Durga Kunwar in favour of one Thakur Das on the 25th day of February, 1910, 22nd day of November, 1907, and 20th day of September, 1909, and a sum of Rs. 230 left with the creditor for satisfaction of the principal and interest of a parol debt. The third item is a sum of Rs. 925 left with the creditor for payment on a simple unregistered bond in favour of one Dwarka Das. The fourth item was the sum of Rs. 4,300 due on a mortgage-deed for Rs. 1,800 executed by Musammat Durga Kunwar in favour of the mortgagee on the 23rd day of March, 1900. An examination of this last mortgage deed, dated the 23rd day of March, 1900, shows that the consideration consisted of three sums, *viz.*, Rs. 750 due on a bond, dated the 5th day of May, 1901, Rs. 700 due on a bond, dated the 23rd day of July, 1902, and Rs. 350 taken for the purposes of paying Government

revenue. The last item was one of Rs. 50 on account of costs of execution and registration of the deed itself.

It must be admitted that the evidence as to these old debts and the grounds on which they were incurred is by no means clear or satisfactory. It is urged on behalf of the appellant that, as they were nearly all on unregistered simple bonds, they must have been clearly the personal debts of Musammat Durga Kunwar, and that, therefore, they cannot be binding upon the estate. It is furthermore contended that, even if Musammat Durga Kunwar had executed those simple money bonds and borrowed the money for the purposes of the estate, still she had no legal power subsequently to bind the estate by a mortgage to cover the payment thereof. For this latter proposition Mr. *Panna Lal* has to admit that he has no authority. He has quoted certain cases before us, namely, *Dhiraj Singh* v. *Manga Ram* (1) and *Kallu* v. *Faiyaz Ali Khan* (2); but the former of these is a case in which the creditor had sued the reversioner after the widow's death, and the second is a case where a suit was brought against the widow, a simple money decree obtained against her and the property sold in execution of that decree. It was held that what was sold in that case was merely her life-estate and nothing more. We would call attention to the case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (3). There it was held, that even in the case of a simple debt incurred by a widow, if she be sued as representing the estate and the property is sold the whole interest would pass and not only her life-estate. We do not think it possible to hold that where a widow or a female owner borrows money for the purposes of the estate on a simple bond and subsequently gives the security of the estate for the payment of the debt, it is beyond her power to bind the estate in this way. In the present case, assuming for a moment that all these old prior debts were incurred by Musammat Durga Kunwar for the purposes of the estate, we think that she had full power to give the security of the estate to secure the payment of those debts. The present case, we think, may be decided on a different principle. There are certain facts which

(1) (1897) I. L. R., 19 All., 300. (2) (1908) I. L. R., 30 All., 394.

(3) (1884) I. L. R., 10 Calc., 985.

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are established by the evidence and which we think ought to be set forth. Even some of the appellant's witnesses had to admit that on the death of Bhagirath Singh Musammat Pran Kunwar's attempt to obtain mutation of names in her own favour was resisted by the agnates of Bhagirath Singh; that later on when Pran Kunwar died Musammat Durga Kunwar was similarly resisted and resisted with a good deal of force. It appears that the male relatives of Bhagirath Singh descended upon the house and practically removed all the movable goods from it. They contested Durga Kunwar's attempt to obtain mutation of names. The witness Umrao Singh had to admit that he on her behalf spent at least Rs. 600 or Rs. 700 in securing mutation. He does indeed say that he never claimed payment of what he had spent for her, but this we do not for an instant believe. One of the documents on the record also discloses the fact that a decree had been obtained against Musammat Pran Kunwar in her life-time, which Musammat Durga Kunwar had to satisfy. There is also the fact that the estate was small. It is true that the appellant's witnesses tried to make out a somewhat exaggerated income of this estate. The Government Revenue at the present time is only about Rs. 1,000. A good portion of the property has for years been in the hands of usufructuary mortgagees. At the time Musammat Durga Kunwar got possession of the estate, which was about the year 1886, the profits of this estate must have been considerably less than they now are. It is also proved by the evidence that Musammat Durga Kunwar's husband Balwant Singh resided with his wife at the house of her mother. There is not a scrap of evidence to show that Balwant Singh had any property of his own, and it is clear that the husband and wife and the whole family lived on the property left by Bhagirath Singh. There were two daughters and two sons and both these daughters and sons were married. The family was Thakur family, and Rajputs as a class are notoriously given to excessive expenditure on the occasions of marriages. One witness has made the absurd statement that the gifts at the time of marriage were equal to the expenditure incurred. Such evidence is valueless and is manifestly untrue. The circumstances, therefore, of this estate were such as to show good

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cause for Musammat Durga Kunwar running into debt. She must have started her possession of the property with a load of debt upon her, incurred by her for the purposes of protecting the estate and in securing it for herself and her sons. We then have the fact that in the year 1910, when she created the mortgage for Rs. 6,400, she had two sons, one of whom was a minor and the other was of age. The two sons were immediate reversioners to the estate and the only one of them that was able in law to express consent actually combined with his mother in the execution of the mortgage-deed. When, later on in the year 1912, the mortgage-deed now in suit was executed, it was similarly executed by the mother and the elder son Ram Singh. An examination of the deed shows that it was Ram Singh who presented it for registration and who carried it through. It is, therefore, clear that the only next reversioner who was able to give consent took an active part in the transaction and joined in the execution of the deed. It was held in the case of *Debi Prosad Chowdhury* v. *Golap Bhagat* (1) that "alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof". In the present case there is clearly no rebutting evidence whatsoever.

In the case of *Ramasami Gounden* v. *Nachiappa Gounden* (2) their Lordships of the Privy Council expressly laid stress upon and showed approval of the decision in *Debi Prosad Chowdhury* v. *Golap Bhagat* (1). We quote the following from that decision:— "When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive

(1) (1913) I. L. R. 40 Calc., 721. (2) (1918) 17 A. L. J., 586.

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proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by JENKINS, C. J., and MUKERJI, J., in the case of *Debi Prosad*".

We think that this principle applies to the present case. There is no rebutting evidence. The origin of the debt is lost in the dim past. There are facts which go to show that the lady, Musammat Durga Kunwar, had good reason to incur debt for and on behalf of the estate and we have the sole next reversioner (her own son) capable of consenting, joining with her in executing the mortgage. It must be remembered that she was not without advice or help, she had her husband as well as her adult son. There was no incentive for her to destroy the estate or to encumber it without good cause. Her natural affection alone would have made her strive to protect the estate for her son. This is not the case where the next reversioner is a distant relative of a deceased husband, but one in which the next reversioner is actually the own son of the female owner. We think, therefore, that, applying the principle laid down in the cases mentioned above, we must in the circumstances draw the clear inference that the mortgage was executed for the purposes of the estate and is therefore a legal and binding one. Under these circumstances we think that the decree granted by the court below is a proper decree and the appeal therefore fails. We dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

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August, 1.

KANNU MAL AND ANOTHER (PLAINTIFFS) v INDARPAL SINGH AND OTHERS (DEFENDANTS)*.

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 83, 84 *and* 103—*Mortgage—Deposit of mortgage money—Procedure necessary when the mortgagee is a minor.*

On a construction of sections 83 and 84 of the Transfer of Property Act, 1882,

*Second Appeal No. 1187 of 1919, from a decree of A. Hamilton, Second Additional Judge of Aligarh, dated the 15th of August, 1919, modifying a decree of Hanuman Prasad Varma, Second Additional Subordinate Judge of Aligarh, dated the 9th of April, 1919.

Held by LINDSAY, J. (STUART, J., *dissentiente*) that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the Court and must bring before the Court some person who is willing to act as guardian, or, failing that, he must satisfy the Court in whatever way he can that there is no person to his knowledge who is willing to accept the duties of a guardian. In that case he can ask the Court to take action under order XXXII, rule 4, of the Code of Civil Procedure. *Pandurang* v. *Mahadaji* (1) and *Shivnath Singh* v *Manohar Lal* (2) referred to.

If, by reason of delay in the appointment of a guardian *ad litem*, the original deposit has become insufficient, an additional sum may be deposited. *Deo Dat* v *Ram Autar* (3) referred to

STUART, J., *contra*. Every such case should be looked at upon its merits. But, speaking generally, a mortgagor has done all that has to be done by him when he deposits the sum due on the date of the deposit, when he presents a duly verified petition and when he states to the best of his knowledge and ability the correct address of an adult mortgagee and proposes, in the case of a minor mortgagee, a suitable person as guardian *ad litem*. To ask him to see that the guardian *ad litem* is appointed is to ask him to do something which it is not in his power to do.

THE facts of this case are fully set forth in the judgment of Lindsay, J.

Mr. B. E. O'Conor and Babu *Durga Charan Banerji*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

LINDSAY, J.:—The principal question for discussion in this appeal is whether a deposit of mortgage money made by the plaintiffs in this suit under the provisions of section 83 of the Transfer of Property Act had the effect of stopping the running of interest.

The facts may be stated as follows:—The plaintiffs in the suit are mortgagees who held under a mortgage, dated the 7th day of September, 1913. The mortgage money was Rs. 2,900 and out of this sum Rs. 2,425 was left to redeem a prior mortgage which was executed on the 29th day of June, 1910.

The suit was a suit for sale and the defendants first party were the mortgagors. The defendants second party were the prior mortgagees.

(1) (1902) I. L. R., 27 Bom., 23. (2) (1913) 16 Oudh Cases, 261.

(3) (1886) I. L. R., 8 All., 502.

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The earlier mortgage of the 29th day of June, 1910, had been executed in favour of five persons, some of whom were minors.

On the 24th day of September, 1913, the plaintiff, Kannu Mal, deposited Rs. 2,425 in court under the provisions of section 83 of the Transfer of Property Act. At the time of making this deposit he applied to the court for service of notice and mentioned that two of the mortgagees were minors. He made an application for the appointment of a guardian *ad litem* to these minor mortgagees and suggested the name of Chhiddu Singh who was the elder brother of the minors.

There was a great deal of difficulty about the service of notice in the case. It is not necessary to refer to the various applications which had to be made, but eventually notice was served on Chhiddu Singh, who agreed to be the guardian *ad litem* of one of the minors whose name was mentioned in the notice. He refused, however, to accept the office of guardian in respect of his other minor brother.

This led to another application being made by the mortgagor Kannu Mal, who asked that the father of the remaining minor, namely one Dambar Singh, should be appointed guardian *ad litem*. After various proceedings Dambar Singh appeared in court and on the 15th day of May, 1914, he was appointed a guardian *ad litem* by the court.

After this, fresh notices were issued to the parties under section 83 of the Transfer of Property Act and the result was that the mortgagees refused to accept the money which had been deposited, saying that it did not make up the full amount which was due under their mortgage.

The courts below have differed in their view of the law. The first court held that in the circumstances the interest on the prior mortgage ceased to run from the date of the deposit, that is to say, from the 24th day of September, 1913. The Subordinate Judge was of opinion that Kannu Mal, the second mortgagee, had done all that was required from him in order to have notice of the deposit given to the prior mortgagees.

The lower appellate court has held that the deposit made on the 24th day of September, 1913, had not the effect of causing interest to cease running. The learned Judge, relying upon

a decision of the Bombay High Court—*Pândurang* v. *Mahadaji* (1)—and also upon a decision in *Shivnath Singh* v. *Manohar Lal* (2), held that on the interpretation of section 84 of the Transfer of Property Act it could not be held that the mortgagor had done all that he had to do until the 15th day of May, 1914, when an order for the appointment of a guardian *ad litem* of one of the minor mortgagees was made. In this view the Judge held that the deposit made in court on the 24th day of September, 1913, was inadequate and consequently interest did not cease to run

The whole case, therefore, turns upon the interpretation of the following words which are to be found in section 84 of the Transfer of Property Act:—"Or, as soon as the mortgagor, . . has done all that has to be done by him to enable the mortgagee to take the amount out of court."

In order to arrive at a correct interpretation of these words it is necessary to refer back to section 83, which sets out in what circumstances the mortgagee can withdraw the money out of court.

Under section 83, if the deposit has been made, the court has the duty cast upon it of serving a notice of the deposit on the mortgagee. After the mortgagee has received the notice he has to present a petition verified in the manner prescribed by the law for the verification of plaints. In this petition he has to state the amount then due on the mortgage and his willingness to accept the money so deposited in full discharge of such amount. Then, on depositing in court the mortgage-deed, if in his possession and power, he may apply for and receive the money.

Where the mortgagee is a person of full age no difficulty can arise. The mortgagor goes to the court, makes his deposit, supplies the address of the mortgagee and thereupon the court has to issue a notice. In this case there is nothing more for the mortgagor to do.

Where, however, the mortgagee is a minor it seems impossible to hold that he can take the steps which are laid down in section 83, that is to say, the steps which a mortgagee has to

(1) (1902) I. L. R., 27 Bom., 23. (2) (1913) 16 Oudh Cases, 261.

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take before he can withdraw the money out of court. No minor is entitled to present a petition to court or to verify it in the manner prescribed by law for the verification of plaints, nor can he do any other act in court except through a person who has been appointed his guardian *ad litem*.

It follows, therefore, that up till the time a guardian *ad litem* has been appointed for a minor mortgagee he is not in a position to take action under section 83 for the withdrawal of the mortgagee money.

The question then arises whether in such a case the mortgagor has done all that the law requires him to do when he has presented a petition to court supported by an affidavit in which he alleges the minority of the mortgagee and where, in addition, he applies to the court for the appointment of a guardian *ad litem*.

That such an appointment has to be made in order to make the proceedings under section 83 valid in the case of a minor mortgagee is clear from the provisions of section 103 of the Transfer of Property Act. This section refers to chapter XXXI of the Code of Civil Procedure of 1882, which corresponds to order XXXII of the present Code of Civil Procedure.

It is apparent from the provisions of order XXXII that the appointment of a guardian *ad litem* to a minor defendant is the act of the Court. The Court has to make an order directing such an appointment but such an order can only be obtained upon an application made to the Court by the plaintiff.

Further, it is to be remembered that the power of the Court under order XXXII of the Code of Civil Procedure to appoint a guardian *ad litem* is limited in this way, namely, that no person can, without his consent, be appointed a guardian for the suit. This being so, no court can make an order for the appointment of the guardian *ad litem* unless it has before it a person signifying his willingness to accept the office of guardian. There is, indeed, a provision, namely, rule 4, sub-rule (4) ,of order XXXII, which enables a court, in cases where no suitable person can be found willing to accept the office of a guardian, to appoint one of its officers as guardian *ad litem*.

It appears to me, therefore, that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the Court and must bring before the Court some person who is willing to act as guardian, or, failing that, he must satisfy the court in whatever way he can that there is no person to his knowledge who is willing to accept the duty of a guardian. In that case he can ask the Court to take action under order XXXII, rule 4.

Applying these principles to the case now before us, it seems to me that until the 15th day of May, 1914 when the Court finally on the application of the mortgagor appointed Dambar Singh the guardian *ad litem* of one of the minor mortgagees, the mortgagor had not, in the language of section 84 "done all that had to be done by him to enable the minor mortgagee to take the money out of court."

This is the view which was taken in the Bombay case which has been followed by the lower appellate court. I was at first inclined to doubt whether that ruling laid down the law correctly, but on consideration I think it does.

There can be no doubt that this interpretation produces inconvenient results for the mortgagor. In the first place, owing to the delay which necessarily takes place in the appointment of a guardian, he is not in a position to deposit in court the precise amount which would be owing on the mortgage at the date of the appointment of guardian *ad litem*. It is no doubt the fact that appointment of a guardian is very often protracted and, as in the present case, this protraction is often the result of some trickery on the part of the defendant or his friends. Another anomaly which arises from this interpretation is this, namely, that it gives a minor mortgagee an advantage over a mortgagee of full age, inasmuch as the interest goes on running after the date of the deposit and can only stop when the appointment of a guardian has been ordered by the court and the full money is paid in. On the other hand, it is to be observed that as soon as a guardian *ad litem* of a minor mortgagee is appointed there seems to be no difficulty in the way of the

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mortgagor's making a fresh deposit. The Act does not specifically provide for this, but there appears to be no reason why it should not be done. I notice that in a case of this Court in *Deo Dat* v. *Ram Autar* (1) such a course was taken. And, again while this interpretation of the section produces the inconvenience to the mortgagor which I have noted above, it is to be remembered that this procedure is enacted for the protection of the mortgagor. By following this procedure the mortgagor can pay the mortgage money to a person who can give a valid discharge in law for the debt.

I have come to the conclusion, therefore, that the view taken by the lower appellate court is correct and that it cannot be said in the present case that interest ceased to run from the 24th day of September, 1913, the date on which the second mortgagee deposited Rs. 2,425 in court. I am assuming of course that Rs. 2,425 represented the full amount which was due on the earlier mortgage on the date of the deposit.

In the fourth ground of the memorandum of appeal a plea is taken that an offer of the mortgage money to one of the joint mortgagees was quite sufficient. That question, however, does not arise, because it is not made to appear that the second mortgagee made any offer of this kind. No offer was made to one of the mortgagees on behalf of all the other mortgagees; on the contrary, the petition which was presented under section 83 shows that a deposit was made for all the mortgagees and the Court was asked to send notice to them all.

Paragraph 5 of the memorandum of appeal raises a question of costs which we think ought to be determined in favour of the appellants. The court of first instance had allowed the plaintiffs' costs against the mortgagors. The appeal in the court below was brought by the prior mortgagees, and the mortgagors did not bring any appeal against the order of costs passed by the court of first instance. In these circumstances I think the learned Judge of the court below was not right in refusing the plaintiffs' costs against the first set of defendants (the mortgagors). Those costs should now be included in the decree in the plaintiffs' favour. Lastly, it is brought to our notice that the

(1) (1886) I. L. R., 8 All., 502

decree which the court below has passed is wrong in form. As to that there can be no doubt whatever. It does not provide for the sale of the property for both the mortgage debts in case the second mortgagee pays off the prior mortgage. I direct that a decree be drawn up by this Court in Form 8, Schedule I, Appendix D, of the Code of Civil Procedure, and allow a period of six months for redemption of the earlier mortgage.

STUART, J. :—The main question is whether the rule laid down by the Divisional Bench of the Bombay High Court in *Pandurang* v. *Mahadaji* (1) should be followed. I propose to examine that ruling. It is agreed that the decision of this appeal will turn, as it turned in the Bombay case, upon the interpretation given to the words in section 84 of the Transfer of Property Act (No. IV of 1882), "as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of court" to the facts. The Transfer of Property Act nowhere lays down what are the duties of a mortgagor in this respect and the facts in each case must be separately considered. The eminent Judge who delivered the judgment in the Bombay case says, at p. 29 :—"The sole question appears to me to be whether it was not incumbent on the mortgagor, in the circumstances of this case, not only to apply for a guardian *ad litem* but also to see that one was appointed. It is clear that for the purposes of a tender under this Chapter of the Transfer of Property Act it would be incumbent on a mortgagor to procure the appointment of a guardian *ad litem*. Till such an appointment has been made there was no one to whom, under the Act, a tender on behalf of the minor could be made. Does not this furnish us with some clue as to the measure of the mortgagor's duty for the purpose of a deposit? I think it does, though I concede that the analogy is not perfect." The learned Judge does not lay down anything definitely here, and with due respect I am unable to agree that the provisions of the Act as to the conditions of making a tender afford any indication as to what are the duties of the mortgagor when he makes a deposit. "Until a guardian *ad litem* has been appointed, all has not been done to enable the minor mortgagee, to take the money out of

(1) (1902) I. L. R., 27 Bom., 23

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court. Something more remains to be done,—the appointment of a guardian *ad litem*. Can the mortgagor claim that he has completely performed his part when he has made his application?." The answer to that question is, as is stated later, the answer to the question whether it is the duty of the mortgagor to see that a guardian *ad litem* is appointed or whether it is the duty of the court to see that a guardian *ad litem* is appointed. "Suppose, for example, that the guardian proposed by the mortgagor were to refuse to act, would nothing remain to be done by the mortgagor? Surely it would be incumbent on him to propose some other guardian, because it is his duty, as it would be under Chapter XXXI of the Code of Civil Procedure, to see that a guardian *ad litem* is actually appointed, for until then there is no one on whom the requisite notice can be served, or authorized to take the money out of court." Here I must differ respectfully from the learned Judge. I do not agree that it is the duty of any litigant to see that a guardian *ad litem* is actually appointed. "It is true that the language of the Legislature is not specific on this point, but any other view might operate hardly on those, who from personal incapacity cannot protect themselves, whereas a construction that would impose on the mortgagor the duty of seeing that a guardian is appointed involves no practical detriment to him if he acts with prudence. Thus it was open to the mortgagor in this case to have moved with sufficient promptness to secure that a guardian should have been appointed in time." I would point out here that if the view taken by the learned Judge is accepted, no amount of promptness on the part of the mortgagor in endeavouring to secure the appointment of a guardian would protect him in respect of the deposit which he made at the time of his application, for *ex necessitate rei* the guardian must be appointed after the money has been deposited; and the money which was sufficient on the date of the deposit is necessarily insufficient at any subsequent date. "I am even inclined to think that he might have made his application for a guardian before depositing his money, for the Act does not dictate any order of sequence, and it is obvious that in the case of an infant mortgagor the application for a guardian must precede the

deposit." This suggestion is open to the criticism that before an application there must be a "lis" and until the money is deposited there is no "lis." If a man applied to the court to appoint a guardian *ad litem* to a minor on the allegation that he proposed to deposit money subsequently under section 83 to the credit of that minor, he would be met by the court's refusal on the ground that his application was premature because up to date there was nothing in respect of which a guardian *ad litem* could be appointed. The next passage of the judgment has no bearing on the point and may be omitted. The remainder is as follows: "The balance of convenience appears to me to favour the view that the mortgagor had not done all that had to be done by him until he procured the appointment of a guardian *ad litem*, and where language is not precise, it is permissible to attribute that effect to it which best accords with convenience and justice, for an argument drawn from inconvenience is forcible in law. There is certainly enough doubt in the language of the Act to permit of the application of this principle. In coming to this conclusion I have not overlooked the arguments based on section 102, but they are, in my opinion, outbalanced by the considerations which have led me to the result I have expressed." It will thus be seen that the decision of the learned Judge, then Chief Justice of the Bombay High Court, was based very largely on considerations of convenience. I am unable myself to accept the view that the point should be determined upon considerations of convenience, but if I accepted that view I should arrive at diametrically the opposite conclusion. Further, it would appear that this judgment proceeds largely upon considerations of protecting adequately an infant mortgagee; but I would suggest here that an infant mortgagee should not be protected in such a manner as to give him an advantage over an adult mortgagee or to the detriment of an honest mortgagor.

With regard to the question of the balance of convenience, it is settled law in this province (and as far as I know the view has not been dissented from in any other province) that in the case of an adult mortgagee the interest ceases to run when the money due is deposited under section 83 from the date

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of the deposit. This view is taken by a Bench of this Court in *Deo Dat* v. *Ram Autar* (1). Interest stops running from the date of the deposit and does not run until the mortgagee has received notice. Now it may be that the mortgagor gives in perfectly good faith what he believes to be the correct address of the mortgagee, and that the mortgagee (whose conduct can also not be questioned) cannot be found at that address. It may then take a very considerable period before it is brought to the notice of the mortgagee that the mortgagor has deposited the money. Nevertheless it has been laid down that once the money is deposited, if the amount is sufficient on the date of the deposit, the mortgagee will get no further interest, however long he may have to wait before he is informed that the money is standing to his credit A point that does not appear to have suggested itself in the Bombay case is this, how is the mortgagor to know the amount that he should deposit in court when one of the mortgagees is an infant? The amount that he has to deposit will vary, according to this view, with the interest that accrues to the date of the actual appointment of the guardian *ad litem*. It is of course impossible for the mortgagor even to guess as to what that date will be. What has he to do? Is he to add six months' interest, or 12 months' interest, or how much, to secure the amount being sufficient by the time the guardian *ad litem* is appointed? There will be inconvenience if he deposits too much in getting the balance returned to him. If he deposits too little, he is of course out of court. If he deposits too much, he is a loser. Surely these considerations affect the balance of convenience.

Secondly, under the Bombay decision a minor mortgagee is placed in an extremely advantageous position compared with an adult mortgagee. In the case of an adult mortgagee the interest stops running from the date of the deposit. In the case of a minor mortgagee he must get more than the amount due on the date of the deposit, and he may get very much more, if his friends are sufficiently astute to refuse one after another to appear as guardian *ad litem*. This is perfectly easy, as we have seen to some extent in the present case. The

(1) (1886) I. L. R., 8 All., 502.

interest for a year or even more could be added, by one man after another refusing to appear as guardian *ad litem*. These questions again appear to me to affect the balance of convenience. While it is clear that everything should be done to protect the interest of a minor mortgagee, I do not see why a child who has money invested to his credit should be given such an advantage over a grown man. In no circumstances is a minor worse off than an adult, if my view be accepted. I would not, however, decide the matter myself upon the balance of convenience but upon another consideration. The law says that the mortgagor must do all that has to be done by him. Surely that means all that lies in his power. It is to be noted that he is not considered responsible for service of notice upon an adult mortgagee, the reason being that he has not the power to enforce the service of notice. That power rests with the court. Similarly he has not the power to appoint a guardian *ad litem*. He can only suggest. He suggests the appointment of a suitable person. If that person refuses, he then suggests the appointment of another suitable person. If that person also refuses, a fresh suggestion must be made, until finally, helpless, he asks the Court to appoint one of its officers. But who makes the appointment? It is perfectly clear that the appointment of a guardian *ad litem* rests with the court and not with the applicant, just as the service of a notice upon a defendant rests with the Court and not with the applicant. When the mortgagor has done his best to inform the court as to who is a suitable person to be appointed as a guardian *ad litem*, does not his duty end there? In my opinion his duty ends there. It is certainly incumbent upon such an applicant to inform the court who is a suitable person to be appointed as guardian *ad litem* to the minor. But if he honestly carries out that duty to the best of his ability, he should be exonerated from payment of subsequent interest if that person refuses to accept the office of guardian *ad litem*. I consider that each case should be looked at upon its merits. In this case I find that the applicant, finding that there were three adult brothers and two minor brothers, co-mortgagees, requested that one of the adult brothers should be appointed as the guardian *ad litem* of the two minors. Could anything be

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more reasonable? The refusal to accept the office of guardian *ad litem* of the minors in question was based upon no sufficient ground, and was palpably made to delay the proceedings. I consider that a mortgagor has done all that has to be done by him when he deposits the sum due on the date of the deposit, when he presents a duly verified petition and when he states to the best of his knowledge and ability the correct address of an adult mortgagee, and I would only superadd as a duty in the case of a minor mortgagee, the proposing of a suitable person as a guardian *ad litem*. To ask him to see that the guardian *ad litem* is appointed is to ask him to do something which it is not in his power to do.

For the above reasons I consider that the deposit made on the 24th day of September, 1913, was sufficient. I do not understand it to be seriously argued in this Court that the deposit was not sufficient on that date. I should take the view which was taken by the trial court and allow the plaintiffs to sell the mortgaged property and the prior mortgagees to take the deposit out of court. As, however, this view is not the view taken by my learned senior brother the order on the appeal will stand as laid down in his judgment.

BY THE COURT:—The appeal is dismissed with costs, subject to the modification noted in the judgment.

Appeal dismissed.

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August, 4.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SAID-UD-DIN (DEFENDANT) *v.* LATIF-UN-NISSA BIBI (PLAINTIFF) AND SHAFI-UN-NISSA BIBI (DEFENDANT) *

Pre-emption—Muhammadan law—Shafi-sharik—Basis of right of pre-emption—Imperfectly partitioned mahal.

In the case of zamindari property, where the Muhammadan law of pre-emption applies, the basis of the right of pre-emption as a shafi-sharik is the common liability for payment of Government revenue. Where, therefore, the property sold is part of an imperfectly partitioned mahal, it does not make any difference whether the pre-emptor's own shares within the same sub-division of the mahal as the share sold or not *Jadu Lal Sahu* v. *Janki Koer* (1 referred to.

*Second Appeal No. 696 of 1920, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 12th of February, 1920, confirming a decree of Mohsin Ali Khan, Munsif of Nagina, dated the 20th of May, 1919

(1) (1912) I. L. R., 39 Calc., 915.

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THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

TUDBALL and SULAIMAN, JJ.:—Second Appeals Nos 696 and 697 are two appeals arising out of a pre-emption suit. Admittedly the rules of the Muhammadan Law apply to the case. The property in question consisted of zamindari shares in 5 khatas in one mahal. The 5 khatas are Nos. 17, 25, 49, 29 and 48. The plaintiff, the vendee, and the vendor at the date of sale were all co-sharers in the mahal. The plaintiff, however, owned shares in khatas nos. 17, 25 and 49. The vendee had no shares in any of the 5 khatas. The plaintiff claimed that he was entitled as being a co-sharer in khatas 17, 25 and 49 to a decree for pre-emption in respect to the whole of the shares sold in those 3 khatas.

In regard to Nos. 29 and 48 he claimed that he stood on the same footing as the vendee and, therefore, under the law as administered in these Provinces, he was entitled to a half of the property sold in these two khatas. The court of first instance gave the plaintiff a decree for half of the property sold in each of the 5 khatas, relying on the ruling in *Jadu Lal Sahu* v. *Janki Koer* (1) Both parties appealed to the lower appellate court. The plaintiff claimed that he was entitled to the whole of the shares sold in khatas 17, 25 and 49. The defendant appealed in respect to all the property sold. The lower appellate court dismissed the defendant's appeal completely, but allowed the plaintiff's appeal and gave the plaintiff a decree for the whole of the shares sold in khatas Nos. 17, 25 and 49 and upheld the first court's decree in respect to the half shares in Nos. 29 and 48. The defendant has come here in second appeal, and reliance is placed on the ruling of the Privy Council in the abovementioned case, and it is urged before us that the plaintiff and the vendee are both co-sharers in the mahal, that they, therefore, stand upon the same footing and that the utmost that the plaintiff is entitled to recover is a half share of the property sold in each of the khatas. The learned vakil for the appellant has to admit that, in face of

(1912) I. L. R., 39 Calc., 915.

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the rulings in *Amir Hasan* v. *Rahim Bakhsh* (1) and *Abdulla* v. *Amanat-ul-lah* (2), the plaintiff is entitled as a pre-emptor, i he stands on the same footing with the defendant vendee, to recover a half share in the properties sold. On behalf of the res pondents it has to be also admitted that there is no difference really between the circumstances of the case now before us and those o *Jadu Lal Sahu* v. *Janki Koer* (3). In that case it was lai down by their Lordships of the Privy Council "that the claim t co-parcenary on which the plaintiff's right of pre-emption wa based arose out of the fact that the vendor and pre-emptor were jointly liable to the payment of the Government revenue assessed on the villages in the mahal and that this joint liability does con stitute the co-parcenary contemplated by the Muhammadan law."

Towards the end of the paragraph on page 533 of the report it is remarked as follows:—

"A mahal is a unit of property; it may consist of one village or of several villages; it may be owned by one or several pro prietors who may have an interest in all or some of the villages comprised in the estate. Their joint liability for the Govern ment revenue arises from the fact that they own undivided interests in the property, and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the revenue authorities, when the share so partitioned becomes a separate unit of property."

We must assume that this is a correct proposition of law, and if it is, then all the co-sharers in a mahal, though they may not own rights in various portions of the mahal, stand upon the same footing so far as the right of pre-emption under Muhammadan law is concerned. We would like to point out that there are many cases of imperfect partition, where the interests of the co-sharers in the mahal are divided completely from one another and that all that remains joint is the liability for the Govern ment revenue. Still it is this liability which has been laid down by the Privy Council as a test of the co-parcenary contemplated by the Muhammadan law. No authority has been cited before us which lays down that the Muhammadan law recognize

(1) (1897) I. L. R., 19 All., 466. (2) (1899) I. L. R., 21 All., 292.

(3) (1912) I. L. R., 39 Calc., 915.

degrees of nearness in the same class of pre-emptors. For instance, all who come within the definition of *shafi shariq* stand on the same footing. In this view the plaintiff and the vendee are both *shafi shariq* and are entitled to share the property which has been sold.

The result is that S. A. No. 696 of 1920 will stand decreed. The decree of the court below will be set aside and that of the court of first instance re-instated. S. A. No. 697 of 1920 will stand dismissed. We think that in view of the circumstances the parties should pay their own costs in this Court and in the lower appellate court. The actual result of the two appeals is that the decree of the court of first instance is restored in its entirety.

Appeal No. 696 decreed.
Appeal No. 697 dismissed.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

PARBHU DAYAL (PLAINTIFF) *v.* JAMIL AHMAD AND ANOTHER (DEFENDANTS)*

1921 *August*, 4.

Act No. X of 1873 (*Indian Oaths Act*), *section* 11—*Pre-emption—Custom—Offer by guardian of minor defendant to be bound by oath of plaintiff—Extent to which minor is bound thereby—Wajib-ul-arz—Perfect partition—Survival of custom of pre-emption.*

In a suit for pre-emption the guardian *ad litem* of one of the defendants, who was a minor, agreed that if the plaintiff, holding Ganges water in his hands, took an oath that he had not refused to take the property in suit before the sale-deed was executed, then his suit should be decreed. The plaintiff took the oath and swore that no offer had ever been made to him and that he had not refused to purchase the property. *Held* that so far as the statement of fact—that the plaintiff had not refused to purchase the property—was concerned the minor defendant was bound: but not with regard to the agreement that the suit should be decreed. *Chengal Reddi* v *Venkata Reddi* (1) and *Sheo Nath Saran* v. *Sukh Lal Singh* (2) referred to

A *wajib-ul-arz* of 1875 mentioned the existence of a custom of pre-emption relating to two categories of pre-emptors, viz., *sharig patti garibi* and *sharig patti digar*. In 1894 there was a perfect partition and in the *wajib-ul-arz* then framed a third class of pre-emptors was added, namely,

* Second Appeal No. 1424 of 1919, from a decree of Shibendra Nath Banerji, Officiating Subordinate Judge of Allahabad, dated the 27th of August, 1919, reversing a decree of Sidheshwar Maitra, Munsif of Allahabad, dated the 15th of March, 1919.

(1 1889) I. L. R. 12 Mad., 488. (2) (1899) I. L. R., 27 Calc. 229

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co-sharers in other mahals *Held* that the effect of the *wajib-ul-arz* of 1894 was not to abrogate the previous custom of pre-emption, but merely to add by agreement a third class of pre-emptors which would be preferred to strangers.

THE facts of this case are fully stated in the judgment of the Court

Mr. *A. P. Dube*, for the appellant.

Maulvi *Haidar Mehdi* (for whom the Hon'ble *Saiyid Raza Ali*), for the respondents.

TUDBALL and SULAIMAN, JJ :—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff alleged that the amount of Rs. 1,300 entered in the sale-deed was fictitious. On behalf of the defendants the custom of pre-emption was denied and it was further pleaded that an offer had been made to the plaintiff and he had refused to purchase, and that the true consideration had been entered in the sale-deed. So far as the amount of consideration was concerned the parties agreed in the court of first instance that it should be fixed at Rs. 1,150. After this the guardian *ad litem* of the defendant, minor, made a statement that if the plaintiff, holding Ganges water in his hands, took an oath that he had not refused to take this property before the sale-deed, then his suit should be decreed. This was duly recorded by the court. The plaintiff agreed to take the oath which was administered to him. The plaintiff swore that no offer had ever been made to him and that he had not refused to purchase it.

On behalf of the defendant no evidence was produced to prove that any offer had been made to him at all, nor was any further rebutting evidence to disprove the existence of the custom adduced. The court of first instance decreed the suit, holding that the custom of pre-emption had been fully established by the entries in two successive *wajib-ul-arzes*, and in addition to that, it was of opinion that the defendant was bound by the oath of the plaintiff. The suit was decreed on payment of Rs. 1,150. On appeal the learned Officiating Subordinate Judge has dismissed the suit. In his opinion the defendant minor was not bound by the statement of his guardian *ad litem* that the suit should be decreed. He was also of opinion that the subsequent *wajib-ul-arz* of 1894 introduced a variation in the custom, under which

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the plaintiff was no longer entitled to succeed. In this view of the matter he has dismissed the suit *in toto*. The plaintiff has come up in appeal to this Court and on his behalf the findings of the learned Officiating Subordinate Judge are challenged. As to the question whether the defendant minor was bound by the statement of his guardian *ad litem*, we are of opinion that the admission can bind him only partially. Accepting the offer made on behalf of the defendant's guardian *ad litem*, the plaintiff took the oath and swore that he had not made any refusal. The minor was, therefore, bound by the statement made by the plaintiff. This is clear from a perusal of section 11 of the Oaths Act of 1873 The case of *Chengal Reddi* v. *Venkata Reddi* (1) and the case of *Sheo Nath Saran* v. *Sukh Lal Singh* (2) are clear authorities on this point. At the same time we think that the statement of the defendant's guardian that the suit should be decreed cannot absolutely bind the minor, because that part of the statement would amount to a compromise or agreement by the guardian which had not been sanctioned by the court, nor had the court considered whether it was for the benefit of the minor. As a compromise it required the sanction of the court, which had not been obtained.

In these circumstances all that we can say is that the defendant is bound by the statement of the plaintiff that there had been no refusal on his part.

Going into the question, however, we are of opinion that the conclusion arrived at by the learned Officiating Subordinate Judge that the *wajib-ul-arz* introduced a variation in the custom is not correct. The first *wajib-ul-arz* of 1875 mentioned only two categories of pre-emptors, namely, *sharik patti qaribi* and *sharik patti digar*, and persons coming under either of these categories had clearly a preferential right as against a stranger. In 1894 there was a partition and the old village was divided into a number of mahals. Ordinarily, if there was no express agreement between the co-sharers, a co-sharer in one mahal not being a co-sharer with owners of other mahal, would have no right to pre-empt a share sold in that other mahal. We find, however, that in 1894 a special provision was entered in the *wajib-ul-arz*

(1) (1889) I. L. R., 12 Mad., 493. (2) (1899) I. L. R., 27 Calc., 229.

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that after *sharik patti qaribi* and *sharik mahal qaribi*, co-sharers in other mahals will have a right of pre-emption as against a person who is an entire stranger to the village. The addition of the third category of pre-emptors in our opinion cannot be said to bring about an alteration in the original custom. The original custom existed among the entire community who owned the village and in spite of the partition they clearly seem to have agreed that the old right of pre-emption *inter se* should continue. This is simply a keeping alive of the old custom and not in any way abrogating or extinguishing it. In fact, all that it can amount to would be an addition or a fresh agreement under which a right of pre-emption was agreed to subsist even after the partition. The *wajib-ul-arz* of the year 1894 is a *primâ facie* evidence of custom and that evidence is strengthened by the subsequent entry in the partition papers of 1884. There is absolutely no rebutting evidence on behalf of the defendant and we are of opinion that the view taken by the first court was correct.

No other question remains undisposed of. We accordingly set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts. We extend the time for deposit of the purchase money to two months from this date.

Appeal allowed.

PRIVY COUNCIL.

MUHAMMAD HAFIZ AND ANOTHER (PLAINTIFFS) APPELLANTS *v.* MUHAMMAD ZAKARIYA (DEFENDANT) AND OTHERS (PLAINTIFFS) RESPONDENTS.*

1921 *November*, 17.

On Appeal from the High Court at Allahabad.

Civil Procedure Code (1908), order II, rule 2 (1)—Cause of action—Suit to include whole claim—Mortgage—Suit to recover principal after suit for interest.

By order II, rule 2 (1), of the Code of Civil Procedure, 1908, "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action;" . . . A simple mortgage executed in 1910 provided by clause 2 that the interest should be paid monthly; and that if it was not paid for six months the mortgagee could realize either the unpaid interest only, or both the principal and interest, by bringing a suit, without waiting for the expiration of the time provided for repayment of the principal; by clause 7, if the principal and interest were not paid within three years, the mortgagee could sue for principal and interest, together with incidental expenses. In 1914 the mortgagee sued in respect of the interest due and obtained a decree. In 1915 he brought a second suit in respect of the principal and the interest then due.

Held that the second suit could not be maintained having regard to order II, rule 2 (1).

Judgment of the High Court affirmed.

APPEAL (No. 27 of 1920) from a judgment and decree (2nd of May, 1917,) of the High Court reversing a decree of the Subordinate Judge of Agra.

The suit was brought in January, 1915, by the appellants and the respondents other than the first named as plaintiffs to recover Rs. 14,000 principal and Rs. 3,010 interest due under a mortgage bond, dated the 14th day of September, 1910. They had, in March, 1914, sued for the interest then due under the mortgage and had obtained a decree. The defendants (now represented by the first respondent) pleaded that the suit could not be maintained having regard to order II, rule 2, of the Code of Civil Procedure, 1908. The material provisions of the deed, and the facts of the case, appear from the judgment of the Judicial Committee.

The Subordinate Judge made a decree in favour of the plaintiffs, but that decree was set aside on appeal to the High Court. The learned Judges (PIGGOTT and WALSH, JJ.) were of

* *Present*: Lord BUCKMASTER, Lord CARSON, Sir JOHN EDGE, MR. AMEER ALI and Sir LAWRENCE JENKINS.

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opinion that the suit was barred by order II, rule 2, which provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." They said that in the earlier suit, which had been undefended, the plaintiffs had not clearly stated that they claimed to have a right to sue for the principal at a subsequent date, and they had taken a decree for a sale of the property not for a sale subject to the debt. The appeal to the High Court is reported at I. L. R., 39 All., 506.

1921, November, 17th.—*S. Hyam* for the appellants.

The High Court misconstrued the effect of the clauses of the deed. The deed gave the plaintiffs after the expiration of three years two distinct and separate causes of action. The cause of action pursued in the earlier suit was strictly limited by the plaint to arrears of interest then accrued, while the cause of action in the present suit was for the principal and for interest accrued since the former suit. The plaint in the former suit gave the defendants clear notice that the cause of action in respect of the principal was reserved. Having regard to the terms of the deed, order II, rule 2, does not apply. Reference was made to the cases mentioned in the judgment of their Lordships, also to *Brumsden* v. *Humphrey* (1), *Read* v. *Brown* (2) and *Pramada Dasi* v. *Lakhi Narain Mitter* (3).

The respondents did not appear.

The judgment of their Lordships was delivered by Lord BUCKMASTER.

In this appeal their Lordships have not had the advantage of hearing counsel for the respondents, but owing to the full and able argument of Mr. *Hyam* they have been placed in complete possession of the facts.

The appeal arises out of a mortgage suit. The appellants and the second, third and fourth respondents represent together the mortgagee. The first respondent was himself one of the mortgagors and represents the other. The mortgage deed in question was executed on the 14th day of September, 1910, and was a simple mortgage, but it took an unusual form. It created security

(1)—(1884) 14 Q. B. D., 141. (2) (1888) 22 Q. B. D., 128.
(3) (1885) I. L. R., 12 Calc., 60.

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for the repayment to the mortgagees of Rs. 14,000 principal and interest at the rate of 8 annas per cent. per month; it then provided by clause 2 that the interest should be paid on the bond as each month went by and that, if the interest was not paid for six months, the creditor should be competent to realize only the unpaid amount of interest due to him, or the amount of principal and interest both by bringing a suit in court without waiting for the expiration of the time fixed, and that the mortgagors should take no objection to such proceedings. The time fixed was that mentioned in clause 7, which provided that if the amount secured by the bond, with interest, should not be paid after the expiration of three years, the creditor should be entitled to realize by bringing a suit for the whole of the amount of the principal and interest, together with other incidental expenses, and again the clause concluded by provision that the mortgagors should have no objection, and, if they took objection to such proceedings, it should be regarded as false.

Three years elapsed after the deed had been executed and no interest was paid, with the result that in April, 1914, the mortgagee had the power, so far as the terms of the deed were concerned, either to bring an action for the purpose of realizing the security in order to obtain repayment of the full principal money and the interest, or simply of the interest alone. He selected the latter course, and on the 16th day of April, 1914, he instituted a suit which set out, with perfect fairness and clearness, the provisions of the bond and the fact that he had elected to pursue the remedies that the bond gave him in respect only of the interest that was then due. The amount of that interest was Rs. 3,010, and in respect of that sum and no more he paid the court fees upon the plaint. The learned Judge before whom this suit was brought made a decree on the 11th day of August, 1914, granting the relief that was claimed, but he appears to have overlooked the peculiar character of the mortgage, for he made a decree which, upon the face of it, was not the decree that the plaintiff had asked for, and certainly not the decree to which the defendants could, on any hypothesis, be entitled. What he did was this: He declared that the amount due to the mortgagee for principal, interest and costs was Rs. 3,270-12-0, a statement

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that the consideration of the plaint itself would have shown to be manifestly inaccurate, for it was perfectly plain from the proceedings that the amount of Rs. 3,010 was the amount claimed as due, and this was for interest alone and did not include one single rupee in respect of the principal, which still remained at the sum of Rs. 14,000. He then provided that if the defendant paid into court the amount so declared to be due, which was the amount of the interest and costs, on or before the 11th day of February, 1915, the mortgagees should deliver up the documents relating to the property, and if required, re-transfer it to the defendant free from the mortgage and from all incumbrances created by the mortgagees or any persons claiming under them. Paragraph 2 of the decree proceeded upon the same footing, and provided that, if the money was not paid in, there should be a sale out of the money realized the claim for Rs. 3,270 should be satisfied, and after that the balance of the money in court should be paid out to the mortgagor.

The result of this decree would have been that the mortgagor could have secured complete redemption by payment of money which, by common consent, was nothing but interest on the sum that he owed and the costs. It is impossible to consider how it was that such a decree passed either the vigilance of the pleader who was appearing for the plaintiff or the consideration of the court, for such a decree was not the decree asked for nor that which, in the circumstances, ought to have been made.

Apparently the money was paid into court, but the mortgagor never asked for re-transfer of the property, and, the property therefore apparently remaining still subject to the mortgage, the representatives of the mortgagee, who had died, proceeded, on the 23rd day of January, 1915, to institute the proceedings out of which this appeal has arisen, seeking relief similar to, but not the same as, that formerly claimed. It was stated that the amount due on the mortgage was the principal money and the interest that had accrued due, less the amount which had been provided by the proceedings formerly taken, and they sought realization of the security and consequential relief. To that suit objection was taken that it was not competent to the mortgagees by reason of rule 2 of order II of the Code of Civil Procedure. The learned

Judge before whom the matter came, being obviously impressed by the injustice which would be done if effect was given to such a defence, decided in favour of the plaintiffs, but upon appeal to the High Court that judgment has been reversed and judgment entered for the defendant. From the judgment of the High Court the present appeal lies.

Now the whole question depends upon considering whether the terms of rule 2 of order II do really bar the plaintiffs from the relief that they seek, and no one would be anxious to stretch or strain the language of that rule in order to cover a case where, if it be made applicable, it is obvious that the plaintiffs may suffer a substantial wrong. The rule runs in these terms :—

(1) "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

There are other provisions of the order to which reference need not be made, because, in their Lordships' opinion, the exact provisions of rule 2 (1), which has been read, cover and fit the present dispute. What was the cause of action that the plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months, or that the three years had elapsed, and the principal was also unpaid, and in either case they could have sued for realization to provide for the whole amount secured by the deed.

The plaintiffs now purported to proceed under clause 2 of the deed, but even in that case the non-payment of the interest was the sole cause upon which they were entitled to ask either for the limited relief that was sought or the larger relief which they abstained from seeking. It is also important to point out that the only relief that could be sought in both cases was realization of the mortgage security, for the mortgage was a simple mortgage containing no express covenant for the payment of the principal and the interest.

Their Lordships think, therefore, that the rule covers the present dispute, and it is only necessary, in deference to the careful argument that is placed before the Board, to refer to one or two of the authorities to which the learned counsel called

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attention. The first was *Chand Kour* v. *Partab Singh* (1), and that can be dealt with very simply. In that case what happened was that a Hindu widow having sold the whole of the estate, and a suit being instituted to set aside the sale, the proceedings were objected to upon the ground that before the sale was effected other proceedings were instituted to obtain an injunction to prevent the sale taking place. It was pointed out that the actual cause and circumstances which gave rise to the dispute were different in both cases, because in the one all that could be alleged was an intention, and all the relief that could be sought was an injunction. In the other, the matter alleged was an act done and the relief sought was the restoration of the property that had been sold. In the case of *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya* (2) it is said that the cause of action means the cause of action for which the suit is brought, and it does not say that every suit includes every cause of action. Their Lordships see no reason to attempt to qualify or to extend those words, because they are in fact nothing but a repetition of the exact words of the Code; the cause of action is the cause of action which gives occasion for, and forms the foundation of, the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. The case of *Yashvant* v. *Vithal* (3) really illustrates this view, for there the learned Judge held that both the causes of action and the remedies were distinct.

Their Lordships, in expressing this opinion, have in mind the fact that, owing possibly to faulty advice, or, it may be, to a misapprehension of their strict legal rights, the plaintiffs are in hazard of losing Rs. 14,000 in respect of a transaction which, so far as can be seen, was a perfectly straightforward transaction effected at a reasonable rate of interest. Whether there be any means now, according to the law in India, of remedying what does appear to be a misapprehension underlying the decree that was made on the 11th day of August, 1914, their Lordships are not prepared to say, but if such opportunity can be afforded

(1) (1888) I. L. R., 16 Calc., 98; L. R., 15 I. A., 156

(2) (1885) L. R., 12 I. A., 116.

(3) (1895) I. L. R., 21 Bom., 267.

consistently with the well-known rules establishing practice in India, their Lordships see no reason to doubt that it will receive considerate attention by the Court before whom it is brought.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitor for the appellants : *H. S. L. Polak.*

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Wallach.

1921
July, 13.

ASHARFI LAL (PLAINTIFF) v. MUSAMMAT NANNHI AND OTHERS (DEFENDANTS)*

Act No. I of 1872 *(Indian Evidence Act), section* 70—*Attested document—Admission of execution in course of suit—Summoning of attesting witnesses not necessary.*

Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document attestation of which is required by law. *Jogendra Nath* v. *Nitai Churn* (1) and *Abdul Karim* v. *Salimun* (2) referred to.

THIS was a suit based upon two mortgage bonds. For the purposes of this report, the only material issue in the case was whether the bonds in suit had been properly proved or not. On this point the finding of the court of first instance was—

"The law requires attestation of witnesses on a mortgage-deed mainly to safeguard fraud. In India where many of the executants of the mortgage-deeds are *pardanashin* ladies such safeguards are very necessary, but in a case where the execution of a document is admitted no question of fraud arises, and to prove attestation by witnesses is simply to satisfy the technicality of law. In the present case the Musammats executants admit execution of the mortgage deeds in suit. Habib Shah, apparently a kinsman of theirs, states that he identified the said Musammats at registration. Thus there is no doubt about the fact that the Musammats executants did execute the deeds in suit,

* Second Appeal No. 1341 of 1919, from a decree of Muhammad Zaul Hasan, Additional Subordinate Judge of Budaun, dated the 22nd of August, 1919, reversing a decree of Muhammad Junaid, Munsif of East Budaun, dated the 31st of August, 1918.

(1) (1903) 7 C. W. N., 384. (2) (1899) I. L. R., 27 Calc., 190.

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and the pen marks on the margin of the said deeds are those of Musammats.

"To satisfy the requirements of law we have the evidence of Thakurdas for the bond of Rs. 150 and that of Lala Basdeo for that of Rs. 50. They are marginal witnesses to the said bonds, and swear that Musammats executed the bonds in their presence. No doubt the two Musammats were in *doolies*, but being of mendicant caste, it is not improbable to imagine that they were not the strict followers of *parda* system.

"The force of the Privy Council ruling on the point has been nullified by Act No. XXVI of 1915, section 2 of which lays down that a mortgage or gift shall not be deemed invalid by reason only that any person who purported to attest as a witness did not see the executant sign it, provided that such person before signing his name on the instrument received from the executants a personal acknowledgment of the same. The latest Privy Council ruling on the point, reported in 16 A. L. J., page 409, makes no mention of the said Act, and I think it must be read in the light of the latest Act on the point. For the said reasons I decide the issue in plaintiff's favour."

The defendants appealed, and on this appeal the lower appellate court arrived at an opposite conclusion. It found:—

"In view of the rulings of *Chidambaram Chettyar* v. *Subbaragava Sastri* (1) and *Ganga Pershad Singh* v. *Ishri Pershad Singh* (2), a Full Bench case, I must hold that no valid mortgages were created by the bonds in suit. The evidence shows that none of the attesting witnesses for either bond saw the executants put their signatures on the deeds in suit. The learned pleader for the plaintiff respondent himself did not try to support the lower court's judgment on evidence. His point was that when the executants did not deny the execution of the bonds in suit they must be held to be valid. The question, however, is not whether the bonds in suit are genuine or false, but whether or not any valid mortgages were legally created by them. In the case of *Radha Shiam* v. *Chunni* (3) it was held that a document which was not executed in the manner prescribed by section 59

(1) (1913) 18 Indian Cases, 207. (2) (1918) I L R., 45 Calc., 749.

(3) (1916) 14 A. L. J., 861.

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of the Transfer of Property Act did not operate as a mortgage, notwithstanding that the mortgagor did not deny the execution thereof. The learned Munsif refers to Act XXVI of 1915 and says in his judgment that under section 2 of the Act it is sufficient if the executant acknowledges execution of the deed in presence of a marginal witness; but this is not the case here. None of the witnesses says that the executants acknowledged execution before him."

The plaintiff appealed to the High Court.

Mr. *J. M. Banerji*, for the appellant.

Mr. *Muhammad Yusuf*, for the respondents.

WALSH and WALLACH, JJ.:—We think this appeal must be allowed. The finding of fact is that none of the attesting witnesses saw the executants put their signatures on the deeds. We cannot interfere with this finding. It seems to us somewhat narrow and pedantic, inasmuch as they were present and one would have thought that it was not unreasonable to presume that they saw what they were there to see. But this question is irrelevant It does not matter whether they proved it or whether they did not. There is an admission of the execution of this document on the pleadings in the case, and section 70 of the Evidence Act, which appears to have been overlooked in the courts below, provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. That section, placed where it is amongst the sections which provide for the calling of attesting witnesses, clearly could only have been intended to dispense with calling such witnesses, and with proving formal execution in a case where the party has admitted it. We are not prepared to hold that that section is limited to an admission made in the course of a suit; but that is immaterial for this purpose. (*Vide Jogendra Nath* v. *Nitai Churn* (1), and *Abdul Karim* v. *Salimun* (2)) The appeal is well-founded and must be allowed and the decree of the first court restored with costs here and below.

Appeal allowed.

(1) (1908) 7 C. W. N., 884. (2) (1899) I. L. R., 27 Calc., 190.

Before Mr. Justice Walsh and Mr. Justice Wallach.

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PHUL CHAND AND ANOTHER (OBJECTORS) *v.* KANHAIYA LAL (DECREE-HOLDER).*

Civil Procedure Code (Act V of 1908), section 11, Explanation IV; order XXI, rule 50 (2)—Execution of decree—Res judicata—How far principles of res judicata *applicable to proceedings in execution.*

A suit for the recovery of money due on two *hundis* ended in a compromise decree whereby the defendant Mangli Prasad, as representing a firm called Bhairon Prasad Mahadeo, agreed to pay the decretal amount by instalments. Four houses and some zamindari property were hypothecated as security for payment of the instalments as they came due, and it was provided that on default being made the decretal amount could be realized from the mortgaged property and from the persons and other property of Mangli Prasad, Phul Chand and Suraj Karan, members of the firm of Bhairon Prasad Mahadeo. The decree not having been satisfied, the decree-holder applied for execution, and had the property charged in the decree attached Whereupon Phul Chand, for himself and his minor brother Suraj Karan, applied for and obtained exemption of the attached property to the extent of two-thirds, upon the grounds that they were not parties to the decree, that they were not disclosed in the plaint as partners, and that the property was not proved to have been the property of the firm. An application for review of this order was dismissed.

The decree-holder then applied under order XXI, rule 50, clause (2), of the Code of Civil Procedure asking for leave to execute the decree against Phul Chand and Suraj Karan as members of the firm, and on this application it was held that they were members of the firm Bhairon Prasad Mahadeo and liable equally with Mangli Prasad to pay the decretal debt. The two brothers appealed.

Held by WALLACH, J., that the application was rightly entertained and was not barred by the principle of *res judicata* or by section 11 of the Code of Civil Procedure. Although the question raised thereby—of the connection of the opposite parties with the firm of Bhairon Prasad Mahadeo—might no doubt have been raised in the former proceedings, it was not so raised, and the explanations to section 11 of the Code of Civil Procedure could not be applied to proceedings in execution. *Kalyan Singh* v. *Jagan Prasad* (1) referred to.

Held by WALSH, J., *contra*. The decision of the court on the application of Phul Chand and Suraj Karan for exemption was conclusive as against the decree-holder and he should not have been permitted to go behind it. *Ram Kirpal* v. *Rup Kuari* (2) and *Kishan Sahai* v. *Alladad Khan* (3) referred to. *Kalyan Singh* v. *Jagan Prasad* (1) distinguished.

THE facts of this case are fully set forth in the judgment of WALLACH, J.

* First Appeal No. 259 of 1920, from a decree of Ladli Prasad, Subordinate Judge of Banda, dated the 23rd of June, 1920.

(1) (1915) I. L. R., 37 All., 589. (2) (1888) I. L. R., 6 All., 269

(3) (1891) I. L. R., 14 All., 64.

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Mr. *A. P. Dube*, for the appellants.

Babu *Lalit Mohan Banerji*, for the respondent.

WALSH, J. :—This is an appeal from an order passed by the execution court under order XXI, rule 50, attaching the property of two young alleged partners, one of whom Phul Chand is dead, so that the order has been made against his heirs and the other of whom Suraj Karan is still a minor, by reason of their being, as I understand the judgment, members of a joint Hindu family and therefore members of the firm which undoubtedly had been carried on by their father Mahadeo Prasad and was afterwards undoubtedly actively carried on by his elder son Mangli Prasad on behalf of them as members of a joint family, if they continued joint, and on behalf of himself and any other person who was interested, if they were separate. The case seems to me an important one and by no means a simple one, although I take a very clear view of what our order ought to be. Unfortunately my brother and I do not agree in the view we take of the questions raised by the appeal, and according to the ordinary practice my judgment, when delivered, will be withdrawn and the appeal will have to be dismissed as the appellants have failed to satisfy both members of the Bench. The detailed facts of the proceedings which led up to this application are fully and clearly set out in my brother's judgment, which I have had the advantage of reading, and it is therefore unnecessary for me to repeat them. I gather that the broad view on which he thinks this order ought to be supported is that grave injustice may be done to the decree-holder if he be precluded, as he would be precluded if we allow the appeal, from proving that the appellants were partners. It seems to me that one answer to this is that, if injustice there be, it has been brought upon the decree-holder by the procedure which he has followed in his endeavour to execute the decree, not, by misfortune or by miscalculation, but by a deliberate effort, in my view, to overreach himself and get an order against the present appellants without running the risk of a decision against him under order XXI, rule 50, which was the appropriate procedure. In other words, he assumed everything in his own favour and applied for execution of the decree by an injunction and by obtaining an attachment of

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the appellants' property without waiting for a decision that the appellants were partners in the firm, whether as members of a joint family or otherwise.

There is another answer. It may be that this is a hard case, but there are instances in which hard cases, if admitted, make bad law, and in my judgment this is one. We have to consider the effect of our decision upon the general law and the sort of future experiments which a decree-holder with a decree against a firm may make if we uphold this order.

By the attachment of the 18th day of August, 1917, which was made by the decree-holder, the present appellants were forced in self-defence, if they ever wanted to save their property, to object. Their objection was that the property belonged to them and not to the firm. The order of the 6th day of September, 1918, which to my mind is the main difficulty in the way of the decree-holder in these present applications, exempted the share upon the present appellants' objection, and exempted it as though they were separated Hindus entitled each to one-third of the property which had been attached, and held that the attached property had not been proved to be the property of the firm. I pause here for one moment to examine the converse case. If it had been found by the court in that proceeding that the property was the property of the firm and that it was attachable in the hands of the then objectors as being members of the firm, what possible remedy had the appellants, or what possible means was there of escaping from that order and from submitting to their property being sold, unless they successfully appealed against the order?

Order XXI, rule 50, is a provision in favour of the decree-holder and in my judgment it ought to be interpreted in that light. It is framed upon the English model, and it provides a scheme for enabling a decree-holder to obtain execution against an alleged partner, in the first place who has appeared and has either admitted or been adjudged to be a partner, or alternatively against a person who has been served in the suit as a partner and has failed to appear. Sub-rule (2) provides an additional procedure for meeting the difficulty which is just the difficulty in this case, which is a frequent difficulty in the case of business firms who in fact trade under other descriptions than their right names

and are allowed by the law to sue and be sued in their trade name. It often happens in such cases that there are persons who are members, and who have provided capital, and are enjoying the profits, whose identity is concealed beneath the trade title which has been adopted, and sub-rule (2) provides that where in such cases a decree-holder desires to enforce his decree against any other persons than the persons referred to, whom I have mentioned already, as being members of the firm, he may apply to the court for leave. If the liability is not disputed, he obtains the leave as a matter of course and the property is liable to execution. If the liability is disputed, then the matter is to be tried in any manner in which an issue may be tried and determined. Nobody can deny that that issue was in fact, however well or however badly, determined by the order of the 6th day of September, 1918. If this order now appealed from is upheld, it necessarily follows that a decree-holder can enjoy a preliminary attempt to execute a decree by attachment or other ordinary proceeding in execution. If he fails, after resistance by the person whose property is sought to be attached, he is then to be allowed to fall back upon order XXI, rule 50, and have, as in colloquial language, a second shot. If he succeeds, the order is undoubtedly binding upon the person who objects to the attachment. How can it be said in such a proceeding that a judgment-debtor is bound and a decree-holder is not? It is my difficulty upon this point which makes me differ from the view taken by my learned brother.

It seems to me that the argument becomes *a fortiori* when the order of the 3rd day of May, 1919, is looked at. That was an application by the decree-holder for review. No doubt it was misconceived, but it was made and it still stands as a binding decision upon the parties in this execution proceeding; and the decision of the court there was that the previous decision had been that the present appellants were not parties to the decree (which by the way was a bad reason because it begged the whole question) and, secondly, that the property sought to be attached was not the property of the firm. Mr. *Lalit Mohan Banerji*, seeking to justify the position of his clients, adopted an argument, which I can only describe as a counsel of despair, by taking

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the line throughout his argument that these proceedings of the decree-holder were *ultra vires*. I do not know what this means. He applied for attachment in the ordinary way to the proper court, and the court which entertained the application entertained it within the scope of its jurisdiction under section 47. I fail to see how these proceedings can be considered *ultra vires*. But, assuming that it is a correct description of them, I further fail to see how a decree-holder can improve his position by getting an order against himself in proceedings which he wishes to ignore and then treating it, although he himself brought it for his own advantage, as a proceeding which should have been treated as *ultra vires*.

I think the decision appealed from is contrary to principle and the directions given to the courts in India by the Privy Council. I refer particularly to the decision in *Ram Kirpal* v. *Rup Kuari* (1), the well known case in which it was sought to get behind an order with regard to mesne profits which had been passed in the interlocutory stages of a case between the same parties by the District Judge. The matter afterwards went up to the High Court, and in the final decree the High Court held that, inasmuch as there had been no final disposal of the point, it was open to the parties in the final proceeding to re-open the question which had been decided by Mr. Probyn in the interlocutory proceedings. An appeal was brought to the Privy Council and they held that the order construing the decree having been made in the same suit in which the application was made, the question whether the law of *res judicata* applied was not relevant. The decision had become final between the parties upon general principles of law, and Sir BARNES PEACOCK used this language :—

"The question, if the term *res judicata* was intended, as it doubtless was, and was understood by the Full Bench, to refer to a matter decided by a court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation. It was as binding between the parties and those claiming

(1) (1883) I. L. R., 6 All., 269.

under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon section 13 " (now section 11) " but upon general principles of law. If it were not binding, there would be no end to litigation."

In my judgment every word of this passage applies to the present appeal. On p. 275, Sir BARNES PEACOCK used the following language :--

" Mr. Probyn's judgment and the order passed thereon was never reversed or set aside. It was said that a special appeal from that judgment did not lie to the High Court. If so, the judgment was final; if an appeal did lie and none was preferred, the judgment was equally final and binding upon the parties and those claiming under them. It would be a reproach upon the administration of justice if after endeavouring for eleven years to obtain execution for mesne profits in accordance with the judgment of a court of competent jurisdiction against which no appeal was preferred, the parties could now be told that that judgment was erroneous, and that they were not entitled to mesne profits."

That case was referred to—I do not say explained, because it seems to me to require no explanation—and acted upon by a judgment of this Court in *Kishan Sahai* v. *Aladad Khan* (1). In that case the judgment-debtor sought to raise, in objection to execution, a point which he had refrained from pleading in the suit and there was a binding order upon him in the same suit between the same parties. The then Chief Justice, Sir JOHN EDGE, used this language :—

" Although section 13 " (now section 11) " may not in terms apply, by reason of the matter not having been decided in another suit, still, the Privy Council in an analogous case has told the courts in India that the principle of law underlying section 13 is to be applied to proceedings in the execution of decrees. The case to which we refer is *Ram Kirpal* v. *Rup Kuari* (2)."

(1) (1891) I. L. R., 14 All., 64. (2) (1883) I. L. R., 6 All., 269.

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Those two cases both apply against a judgment-debtor. It seems to me that the same principle must be applied against a decree-holder who has the misfortune to obtain an order in the proceeding against himself which he does not set aside. To my mind difficulty is created by attempting to apply the provisions of section 11 to a general principle of law. In fact the principle which the Privy Council has set is not governed by section 11 at all. It only confuses the issue to examine the Explanation to section 11 in a matter to which section 11 does not apply. It further confuses the issue to talk about *res judicata* when the principle of *res judicata* is not involved. That is the respectful comment which I make upon the decision of Mr. Justice CHAMIER which was affirmed in Letters Patent appeal by this Court in *Kalyan Singh* v. *Jagan Prasad* (1). It seems to me that a somewhat unsuccessful effort is made to distinguish that case from the decision in the Privy Council. The Privy Council expressly decided that the principle of *res judicata* did not apply, and therefore it does not help matters to hold that a judgment-debtor is not prevented by certain proceedings by the principle of *res judicata* and to examine the Explanation contained in section 11. In that case if I may respectfully say so, the decision was clearly right, but the point was somewhat different. It certainly has no application to the present appeal in my view. The point was, what was the balance due from the judgment-debtor to the decree-holder when the final decision in the execution proceeding was reached? There had been previous execution proceedings, but the question of the balance due was not then relevant. Intermediate matters had to be got out of the way. Property which had been attached and seized by the decree-holder had to be realized before the pecuniary extent of the judgment-debtor's remaining liability could be put into precise figures. When at the last stage in winding up the final account it was necessary to see how much remained due from the judgment-debtor, it was discovered that the decree-holder was charging interest upon costs beyond what he was entitled to receive. The correct answer, in my judgment, if it was a correct answer, was that that point had never been decided.

(1) (1918) I. L. R., 37 All., 589.

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In my view the issue is confused by introducing a discussion of Explanation IV to section 11 in matters in which the Privy Council has distinctly said that section 11 has no application. In my view the orders of the 6th day of September, 1918, and the 3rd day of May, 1919, are final and binding upon the decree-holder and on that ground the appeal ought to be allowed.

In that event it would be unnecessary to consider the evidence on the merits. I do not propose to dwell, at the length I otherwise might do, upon the evidence taken in the court below upon the merits, inasmuch as, if this order stands to-day, the question will never arise, and if an appeal is brought from this decision the appellant will be able to go into that question before the appellate court. I will content myself with saying that, ignoring the positive evidence which was given in the previous proceeding in 1918, in favour of the appellants and the somewhat attenuated answer which the decree-holder at that stage made, (I am doubtful whether we, sitting as an appellate court, are entitled to look at the evidence given in the previous proceeding in 1918, which might have been brought on the record in this case and was not), I am bound to say that the judgment of the learned Judge in this case does not strike me as founded upon a really careful examination of the balance of the evidence. He apparently accepts the evidence of three witnesses who acted some time or another as mukhtar-ams for Mangli Prasad. Still, on the other hand, he assigns that as a reason for rejecting the evidence of a person who was acting in a similar capacity for the other side at the time of the hearing. The case for the appellants is that, being originally members of a joint family, the elder brother retired from this province and went to Jaipur, and that in this application they did not trouble to call much evidence on the question as they had done so once already. It was on the record in the execution proceeding of the very court which was hearing the case and they had an order in their favour with reference to this actual property. But it is to be observed that the present respondents, although they had had the benefit of a dress rehearsal or preliminary hearing upon the merits, did not attempt to call any evidence from Jaipur where the partition had been said, and in my opinion, had been found,

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to have taken place, and all the witnesses they put forward carefully refrained from professing any knowledge as to what happened after the brothers went to Jaipur. The only question with regard to Jaipur which they relied upon at all was the date when the removal took place. They contended that the date was after the liability was incurred and even after the commencement of the suit, whereas every witness was judiciously vague and hopelessly contradictory with the other, and it is impossible to come to a definite conclusion on that point. It seems to me that this is one of the salient points in controversy and the learned Judge has altogether missed it. He throws no light upon it, but merely finds as a fact that the appellants are members of a joint family. On these questions I am strongly in favour of upholding the findings of fact of the court below, but I am not at all satisfied that the decision in this case was according to the weight of evidence.

But the point that strikes me about the investigation of the evidence, particularly the evidence which was given at the hearing in 1918—and because that order is in question, I think we were bound to look into that evidence—is that there was a mass of evidence on both sides with regard to the partition, with regard to the date, with regard to the membership of the appellants' joint family and their membership of the firm, and whether the court in the order which it passed on that occasion expressed itself well or badly, or disposed of the case in a satisfactory way, there is no doubt that the parties were under no misapprehension as to the issue in dispute. The issue in dispute on the evidence was clearly whether or not they were members of the joint family and, in my view, the learned Judge could not by law have come to the conclusion he did and passed the order exempting the property as he did, without deciding that question as a question of fact. For these reasons I think the appellant is right.

WALLACH, J.:—This appeal arises out of an application, dated the 5th day of May, 1919, under order XXI, rule 50, clause (2). It appears that on the 9th day of April, 1915, the firm Bhairon Prasad Mahadeo executed a *hundi* for Rs. 2,500, in favour of Gajadhar Prasad, payable 181 days after date. On the 10th day

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of April, 1915, the same firm executed a *hundi* for Rs. 2,500 in favour of Bhagwan Das and Babu Damodar Das payable 181 days after date. The rights of the payees of both these *hundis* were bought by Lala Kanhaiya Lal, the respondent in this appeal. On the 10th day of August, 1916, he brought a suit for Rs. 5,377-8, being the principal and interest due on the two *hundis* afore-mentioned. He impleaded as defendants (1) the firm of Bhairon Prasad Mahadeo, (2) Bhagwan Das, (3) Babu Damodar Das and (4) Gajadhar Prasad. A compromise decree was passed on the 28th day of November, 1916, in which Mangli Prasad on behalf of the defendant firm undertook to pay Rs. 6,120 in five instalments. Four houses and certain zamindari property were mortgaged as security for the due payment of the instalments due under the decree. The decree provided that on the failure to pay one instalment, or if interest payable fell into arrears for six months, the whole decree could be executed, and that the decretal amount could be realized from the mortgaged property and the person or other property of Mangli Prasad, Phul Chand and Suraj Karan, members of the firm Bhairon Prasad Mahadeo. The decree was only against the defendant no. 1, defendants nos. 2, 3 and 4 having been exempted by the plaintiff's vakil. There having been a breach of a condition of the compromise decree, the decree-holder applied, on the 30th day of July, 1917, for execution and asked that the property charged in the decree be attached and sold. On the 8th day of August the plaintiff applied for an injunction restraining Mangli Prasad, Phul Chand and Suraj Karan from dealing with the property which had been mortgaged. The property was actually attached on the 18th day of August, 1917. On the 12th day of September, Phul Chand, on behalf of himself and on behalf of his minor brother Suraj Karan, applied to have the property exempted from attachment. This application sets out that the attached property belongs to the objectors and not to the judgment-debtors and that the decree in execution of which the property had been attached did not contain the names of the objectors as judgment-debtors. The objection further stated that the objectors had filed an application to set aside the *ex parte* decree. In fact an application by Phul Chand on behalf of himself and his minor brother was filed on the 8th day of September, 1917, to set

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aside the *ex parte* decree. Orders in both these cases were passed on the 6th day of September, 1918. The order in the case objecting to the attachment of the house and zamindari property is as follows:—

"The decree-holder has obtained a simple money decree against defendant no. 1, i.e., firm Bhairon Prasad and Mahadeo. The present objectors were not parties to the decree. Mangli Prasad appeared for the firm. These objectors are brothers of Mangli Prasad. They were never disclosed in the plaint as partners. The property attached has not been proved to be the property of the firm. Under the circumstances, attached property must be the property of the objector as well as that of the judgment-debtor Mangli Prasad representing the firm.

ORDERED.

2/3rd share in the property attached be released; parties to bear their own costs."

The order dismissing the application to set aside the *ex parte* decree was that the applicants were not parties to the decree and that the court did not see how they could apply to have the decree set aside in the execution department. The decree-holder filed on the 14th day of September, 1918, an application for review of the order of the 6th day of September, 1918, releasing 2/3rds of the mortgaged property from attachment. This application was dismissed on the 3rd day of May, 1919. The court in dismissing the application for review explained that the order of the 6th day of September, 1918, was based on two points, namely:—

(1) That the objectors were not parties to the decree, and

(2) The attached property was not proved to be the property of the firm.

The learned Subordinate Judge (who has succeeded the Subordinate Judge who passed the orders of the 6th day of September 1918, and the 3rd day of May, 1919), delivered on the 23rd day of June, 1920, the order now under appeal. He held that the previous orders were no bar to the application under order XXI, rule 58 clause (2). On the merits he held that Phul Chand and Sukh Karan were members of the firm Bhairon Prasad Mahadeo at the time when the *hundis* of the 9th and 10th of April, 1915, were executed and that they were as much liable to pay the decree

debt as Mangli Prasad was. It has been strenuously contended in appeal before us that the learned Subordinate Judge was wrong in allowing the parties to go into the merits of the case and that he should have held that the order of the 6th day of September, 1918, was final and conclusive between the parties. On behalf of the respondent it is urged that the application for attachment of the mortgaged property was unnecessary and that the filing of this application in no way prevented the decree-holder from seeking an adjudication under order XXI, rule 50, clause (2). The present application is as to who the members of the firm Bhairon Prasad Mahadeo were. I do not think that the decree-holder can escape being bound by the decision of the 6th day of September, 1918, merely because his application was unnecessary. This application gave rise to Phul Chand and Suraj Karan's application of the 28th day of September to have the attachment removed. If in these applications the issue now before the court has been heard and finally decided, then on the analogy of section 11 of the Code of Civil Procedure the decree-holder would be barred from re-opening the issue. Explanation III to section 11 reads as follows: "The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other." Explanation IV lays down:—"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." Explanation IV, therefore, extends the principle of *res judicata* not only to questions which have been heard and finally decided by the court but also to matter which might and ought to have been made ground of defence or attack. There is no doubt that in the proceedings anterior to the application under order XXI, rule 50, clause (2), the question which has been decided on the merits by the learned Subordinate Judge in favour of the decree-holder might have been raised. In considering whether the doctrine set down in section 11 of the Code of Civil Procedure is to be applied by analogy, it is convenient to refer to the decision of CHAMIER, J., in *Kalyan Singh* v. *Jagan Prasad* (1), which decision was subsequently upheld in appeal under

(1) (1914) 13 A. L. J., 162.

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section 10 of the Letters Patent by RICHARDS, C. J., and RAFIQ, J., in *Kalyan Singh* v. *Jagan Prasad* (1). The report shows that previous rulings on this point were brought to the notice of CHAMIER, J. CHAMIER, J., on p. 165 of the report says:—"It has been held in several cases that a matter once decided by a court executing a decree cannot be re-opened at a subsequent stage of the proceedings; but I am not aware that it has been held that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once and for all, and that, if he does not do so, matters which he has omitted must be treated as *res judicata* against him even if he was not aware of them. In the present case there has certainly been no decision on the question now raised, and in the absence of authority I am not prepared to hold that the matter is *res judicata* against the judgment-debtor because he had a previous opportunity of raising the question but did not do so." On page 590 their Lordships in upholding the decision of CHAMIER, J., say:—"It seems quite clear that the provisions of the Code as to *res judicata* are not expressly made applicable to execution proceedings. It is said, however, that there are numerous authorities in which the principle of *res judicata* has been applied to execution proceedings. No authority has been shown to us where it has been decided that if a judgment-debtor does not take exception to the amount set forth as being due in an application for execution, he is prevented by the rule of *res judicata* from ever afterwards raising the question. To hold that he was would not only be applying the rule of *res judicata* in a way not provided for by the Code but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid Explanation IV that the decree-holder can contend that the question has already been decided . . . If it is considered expedient (we do not say it is) to make all the provisions of section 11 of the Code applicable to execution proceedings it should be done by the Legislature and not by the judges."

(1) (1915) I. L. R., 37 All., 589.

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In the application for attachment the decree-holder did not ask for an adjudication as to whether Phul Chand and Suraj Karan were members of the firm Bhairon Prasad Mahadeo, but took for granted that they were members of that firm, and without asking for an adjudication on this point, claimed attachment of the property mortgaged as well as of their own property if the mortgaged property was not sufficient to satisfy the decree. In the application to release the property from attachment, which may be taken as the answer to the decree-holder's application of the 30th day of July, the present appellants did not specifically raise the plea that they were not members of the firm and that therefore their property could not be attached in execution of the decree. What they did say was that the attached property was their sole property and did not belong to any judgment-debtor, that Mangli Prasad, the brother of the objectors, having become ruined had emigrated to Jaipur and that the decree in execution of which the property had been attached did not contain the names of the objectors as judgment-debtors and was also invalid according to law. The evidence of the two witnesses who were examined by the court in the proceedings for setting aside the *ex parte* decree was read to us. That evidence was to the effect that Mangli Prasad had emigrated to Jaipur and that no separation between the objectors and Mangli Prasad had taken place in the presence of the witnesses. We were told that there was other evidence which had been taken on commission and which went to show that a separation had actually taken place between the brothers. The Judge evidently did not take the view that the brothers were separate, because he released a 2/3rd share of the attached property and directed the parties to bear their own costs. The order of the Judge has already been quoted. Had the Subordinate Judge accepted the objector's contention, he would have released the whole of the attached property. The reason for his decision appears to be that the objectors were not parties to the decree, that their names were not disclosed in the plaint as partners, and that it had not been proved that the attached property belonged to the firm. It seems that the learned Judge did not have before him, and did not intend to decide, the issue which was adjudicated upon in the order which

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is now under appeal. This is the issue as to whether or not Phul Chand and Suraj Karan were members of the firm of Bhairon Prasad Mahadeo at the time when the *hundis* of the 9th and 10th of April, 1915, respectively, were executed. It seems to me that a grave injustice might be done to the decree-holder if in the circumstance he were precluded from proving in these proceedings that the appellants were partners of the firm in question. In my opinion, therefore, the appeal must now proceed on the merits.

We have now been addressed on the merits of the case. Mr. *Dube* on behalf of the appellants has read not only the evidence of the two witnesses who were examined in court in the proceeding in 1918, and to which I have already referred above, but has also read the evidence which was taken on commission in Jaipur. In my opinion that evidence is not admissible in these proceedings, not having been legally brought on the record. But as the evidence has been read I should like to say that in my opinion it does not carry the case of the appellants very far. Five witnesses were examined on commission in Jaipur on the 3rd day of March, 1918. They all profess to have taken part in the division of the property between Mangli Prasad and his two minor brothers. They do not say when the partition took place, except that it happened 2 or 2½ years before they gave evidence. They say that a partition deed had been executed. It is not said whether the deed of partition was registered or not. The partition deed was never produced in evidence. It does not appear who acted on behalf of the minors in those proceedings. Having heard the evidence read, I hold that it does not prove a partition of the family. Certain documentary evidence, which was produced in that case, was also referred to by Mr. *Dube*, but in my opinion it does not carry his case any farther. The documentary evidence produced on behalf of his clients consisted of the plaint and written statement in a suit brought by the firm Baijnath Juggi Lal against the firm Bhairon Prasad Mahadeo through Mata Din. In paragraph 3 of the written statement Mangli Prasad alleged that he and his two minor brothers were members of the firm. Two documents had also been produced on behalf of the respondents in the proceedings

of 1918. One was the plaint in suit No. 55 of 1915 in the Munsif's court at Banda, in which Mangli Prasad and his two brothers Phul Chand and Suraj Karan jointly sued a person for a debt which has been contracted in favour of their deceased father. The second document was the plaint in suit No. 451 of 1915 in the same court, in which the three brothers and Mata Din sued, as members of the firm of Bhairon Prasad Mahadeo, two persons for a debt contracted in the life-time of their father. That evidence is certainly not in favour of the appellants. In 1919, in the proceedings out of which this appeal has arisen, a certain number of witnesses were produced on behalf of the respondents. Of these one Mahadeo Prasad, a vakil practising at Karwi, giving evidence in 1919 said that the three brothers were members of a joint Hindu family, 2 or 2½ years before he gave evidence. That would take us back to the year 1917, about a year after the decree which is sought to be executed was passed, and a considerable time after the *hundis*, which were the basis of the suit, were executed. Suraj Din, who lives in Karwi close to the house of the firm, also testifies that Mahadeo Prasad was the owner of the firm and that after his death his three sons were members of the joint Hindu family and remained members of the firm, and that after the decree was passed the three sons went away to Jaipur. It is unnecessary to refer to the other evidence which was produced on behalf of the appellants. I agree with the Subordinate Judge that that evidence is credible and substantiates the respondent's case.

On behalf of the respondent we were referred to the evidence of Kammu Beg. He admits in cross-examination that at the time the suit on the *hundis* was instituted he was the *munim* of Mangli Prasad, and as such he professes to have signed the *vakalatnama* in favour of the vakil on behalf of Mangli Prasad and his two minor brothers. The only other witness who was referred to was Sheo Balak. He says that after the death of Mahadeo Prasad, Mangli Prasad remained *malik* of the shop, but does not know if Phul Chand and Suraj Karan had any concern with the shop or not. He adds they were minors. This evidence does not establish the case set up by the appellants. In

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my opinion the appeal must be dismissed, on the merits as well as upon the point of law that has been raised.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

1921
August, 9.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

SOTI SURAJ MAL (PLAINTIFF) *v* THAN SINGH (DEFENDANT).*

Mortgage—Right of mortgagee to enforce his whole claim against part of mortgaged property—Mortgaged property transferred to various hands, but not owing to the action of the mortgagee.

Where property the subject of a mortgage has been broken up and various portions transferred to different alienees, the mortgagee, provided that he himself has not been a party to destroying the integrity of the mortgage, is entitled to realize his whole debt from any portion of the mortgaged property. *Sheo Tahal Ojha* v. *Sheodan Rai* (1) followed *Jugal Kishore Sahu* v. *Kedar Nath* (2) distinguished.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondent.

GOKUL PRASAD and STUART, JJ.:—This is an appeal by the plaintiff arising out of a suit for sale on a mortgage. The mortgage-deed in suit was executed on the 19th day of October, 1906. Sipahi Singh, defendant No. 1, was the mortgagor and one Ali Muhammad, who sold his rights subsequently to the plaintiff, was the mortgagee. The property mortgaged was all the mortgagor's interests and rights in 20 biswas zamindari of a certain village. The plaintiff alleged that at that time the defendant's name was entered over a 1 biswa, 4½ biswansi share only, and this was mortgaged; that out of this a 6¼ biswansi share was sold at auction in execution of a decree on a prior mortgage. He, therefore, claimed the whole of the mortgage money from the remaining 18 biswansis odd. The last mentioned share was sold at auction in execution of a simple money decree and has been purchased by Mulaim Singh, defendant no. 3.

* Second Appeal No. 1884 of 1919, from a decree of V. E. G. Hussey, District Judge of Moradabad, dated the 19th of May, 1919, modifying a decree of Lalta Prasad Johri, Subordinate of Moradabad, dated the 4th of February, 1919.

(1) (1905) I. L. R., 28 All., 174. (2) (1912) I. L. R., 34 All., 606.

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Defendant No. 4, Than Singh, has been impleaded as a puisne mortgagee.

The defence of Than Singh was that the bond in suit did not create any incumbrance; that the mortgagor had acquired a 5 biswa share under a pre-emption decree before the mortgage in suit; that this share was also included in the mortgage, and has subsequent to the mortgage been purchased by the plaintiff's own nephew Parmanand, and that the plaintiff dishonestly released this property from his claim. He further pleaded that the plaintiff could not get more than the proportionate amount of the mortgage debt chargeable on the 18½ biswansis share which the plaintiff wanted to sell. He also pleaded priority to the extent of Rs. 708-5-0. The defence of Mulaim Singh, the son of the mortgagor, was similar. The trial court came to the conclusion that the document of the 19th day of October, 1906, created a mortgage, that the share really mortgaged was only the 1 biswa, 4½ biswansis, originally owned by the mortgagor and with regard to which his name was entered, and did not and could not include the 5 biswas acquired by the pre-emption later on. He further went on to hold that even if the 5 biswas share were supposed to have been mortgaged, that fact could not affect the plaintiff's right to recover the whole of his mortgage money from a portion of the mortgaged property if he so wished. He also came to the conclusion that Parmanand who had purchased the 5 biswas share in execution of a simple money decree, although a nephew of the plaintiff, was separate from him. He decreed the suit for sale subject to the plaintiff paying to Than Singh Rs. 55 on account of the prior charge in the latter's favour. The defendant Than Singh went up in appeal and the learned Judge found (1) that the hypothecated property consisted of 6 biswas, 4½ biswansis, or in other words that the pre-empted share of 5 biswas was also included in the mortgage and (2) that the mortgagee could not throw the burden of the whole of the mortgage money on the 18 biswansis odd share only and release the 5 biswas pre-empted share, purchased by his nephew, from the claim. He also made a slight alteration in the amount awarded to Than Singh as a prior charge holder. Strange to say, the decree as framed in appeal is not exactly in accordance with the

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findings and this is because of the final order of the District Judge. It runs as follows:—"For the above reasons I allow the appeal with costs. The cross-objection is dismissed." The operative part of the judgment did not clearly specify the relief which was granted to the plaintiff or to what extent the appeal had been decreed. The plaintiff comes here in second appeal. His first contention is that the property mortgaged consisted of a 1 biswa, 4½ biswansi share only, as the mortgagor had not become the full owner of the pre-empted property at the time when the mortgage in suit was made and, secondly, that, even if he had become the owner thereof, the mortgagee was under the law entitled to recover the whole of the mortgage money from any portion of the property mortgaged to him and was not bound to enforce his mortgage against the whole of it.

In order to decide the first point it is necessary to refer to certain facts. As has been stated above, the mortgage in dispute was executed on the 19th day of October, 1906.

It appears that Sipahi Singh the mortgagor brought a suit for pre-emption of a 5 biswas share in the village on the 29th day of June, 1905. The suit was decreed on the 10th day of November, 1905, on the condition that he was to pay Rs. 3,000 within two months of the decree becoming final. On the 6th day of January, 1906, Sipahi Singh executed a mortgage of the pre-empted 5 biswas share in favour of one Kundan Lal in order to raise funds to pay up the pre-emption money, and deposited Rs. 3,000, the pre-emption money, in court on the 8th day of January, 1906. He applied for execution and got possession the same day. The defendant in that suit went up in appeal and on the 17th day of August, 1906, the appellate court added Rs. 250 to the pre-emption money and a further sum of Rs. 24 as costs to the amount already payable under the decree of the first court. This extra amount was paid in by Sipahi Singh on the 25th day of October, 1906. This payment was within time because of the intervention of the civil court's long vacation. There can be no doubt in these circumstances that Sipahi Singh had become owner of and come into possession of the pre-empted property under a subsisting decree of court and treated it as his own, long before the date of the mortgage in suit, and, as the mortgaged property comprised

the whole of his rights and interests in the village, the mortgage was of the total 6 biswas odd share then owned by the mortgagor.

This brings us to the second point raised in this appeal.

Has the plaintiff the right to claim that the whole of the debt due under the deed is to be borne by a portion of the property mortgaged?

In *Sheo Prasad* v. *Behari Lal* (1) a Bench decided (1) that it was competent for a mortgagee to abandon a part of his security and sue for the sale of the remainder, and (2) if the sale proceeds of the remainder proved insufficient to satisfy his decree, to obtain a decree under section 90, Act IV of 1882, against the unhypothecated property of the mortgagor. This decision followed on the first point the decision of a single Judge in *Jai Gobind* v. *Jas Ram* (2). In 1905 a Full Bench had to decide whether a mortgagee could abandon a part of his security and foreclose on the remainder. The Full Bench in *Sheo Tahal Ojha* v. *Sheodan Rai* (3) decided that he could do so. In this decision the decisions in A. W. N., 1893, p. 120, and I. L. R., 25 All., 79, were approved. It has been urged for the respondent that the pronouncement at p. 178 "it is competent to a mortgagee to abandon a part of his security and sue for the sale of the remainder" is not authoritative. We do not agree. It is on this principle that the right to sue for foreclosure of a portion—the point then under decision—was justified. Thus we have on the authority of a Full Bench that a mortgagee can claim that the whole debt shall be borne by a portion of the mortgaged property.

But it is urged that the principle does not apply when the mortgaged property has been divided amongst several owners after the execution of the mortgage. We are unable to understand why it would not so apply, except in cases where the mortgagee has destroyed the integrity of the mortgage. The authority of a Bench in *Jugal Kishore Sahu* v. *Kedar Nath* (4) is quoted, but that decision only determined that where the mortgagee had accepted money in full satisfaction of the amount due in respect of a liability on a portion of the mortgaged property he could

(1) (1902) I. L. R., 25 All., 79.
(2) Weekly Notes, 1893, p. 120.
(3) (1905) I. L. R., 28 All., 174.
(4) (1912) I. L. R., 34 All., 1606.

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only recover the proportion due on the remainder. There the mortgagee had himself destroyed the integrity of the mortgage. The decision is authority for the rule that where the mortgagee has, prior to the suit, definitely released part of the property from the mortgage for consideration, without receiving from the releasee his proper share of the mortgage money, he cannot in a suit against a subsequent purchaser or mortgagee obtain a decree against the rest of the mortgaged property for the balance of the mortgage money (p. 610). We express no opinion on the doctrine enunciated, as the point does not arise here, beyond observing that in such a case the mortgagee has himself disturbed the integrity of the mortgage.

But in this case, where the mortgagee has been no party to the division of the mortgaged property, the principle that the mortgagee has the right to sell a portion of the mortgaged property to recover the whole amount due on the deed holds good, whether the division has been the result of a voluntary or involuntary transfer. The owner of the portion sought to be sold, if he redeems, can claim contribution from the owners of the remainder. The dispute here is as to form rather than effect, for if the mortgagee had sought to bring to sale the whole of the six biswas odd, he could, after he obtained his decree, bring to sale a portion in satisfaction of the total amount due.

In this view the appeal must succeed. The decree of the trial court is restored, with this modification that the amount of Rs. 55 due to Than Singh is increased to Rs. 88. The parties entitled to redeem will be allowed six months from the date of this decree. The plaintiff will be allowed three months from the date of their failure to redeem within which to deposit Rs. 88 and will then be entitled to add that Rs. 88 to the decretal amount. The respondent will pay his own costs of this appeal and those of the appellant.

Appeal allowed.

Before Mr. Justice Walsh and Mr. Justice Wallach.

UNION INDIAN SUGAR MILLS COMPANY, LIMITED (OPPOSITE PARTY) *v.* JAI DEO (PETITIONER)*

1921
August, 10.

Act No. VII of 1913, *(Indian Companies Act), section* 38—*Company—Application for rectification of share register—Question of title—Discretionary power of court to refuse to decide such question—Appeal—Procedure re transfer of shares in Company.*

Held on a construction of section 38 of the Indian Companies Act, 1913, that the District Judge is not obliged to decide a question of title raised in a proceeding before him under the section; but if he does decide such a question, or if he directs an issue to be tried, in either case an appeal from the decision will lie in the manner provided by section 100 of the Code of Civil Procedure.

Observations on the powers and duties of a Company in connection with the transfer of its shares and corresponding alterations in the share register of the Company.

THE facts of the case are fully set forth in the judgment of the Court.

Mr. *B. E. O'Conor* and Dr. *Kailas Nath Katju* for the appellant.

Dr. *Surendra Nath Sen* and Babu *Saila Nath Mukerji* for the respondent.

WALSH and WALLACH, JJ.:—This is a simple matter. Certain property, including the shares in question in a limited liability company known as the Union Indian Sugar Mills Co., Ltd., having its registered office in Cawnpore, was held by a family, jointly. It is alleged by one Debi Dat, who happens to be at this time the managing director of the company, with of course a commanding influence in the managment of its affairs, that in the year 1918 he separated from the branches of the family whom we will refer to compendiously as the respondents, and that an elaborate partition was carried out, with the result that the shares now in dispute were made over to him as part of his share. Although the evidence of the fact has never been put on the record, either by sworn testimony or by formal admission so that one could say that it was properly on the record in the way in which we are accustomed to use that language, it appears from the surrounding circumstances that what he did was, having the share certificates in his possession,

*First Appeal No. 11 of 1921, from an order of E. H. Ashworth, District Judge of Cawnpore, dated the 3rd of January, 1921.

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as would naturally be the case if his story is true, he did not trouble himself very much about the state of the register of shareholders in the company's book. At the time of the partition, various blocks of these shares were registered in the names of the six different individuals who now figure as respondents. Some time afterwards, namely, on the 2nd day of January, 1919, Debi Dat appears to have woke up and to have carried out the partition in his own interest, so far as it affected these shares, by the following proceeding. He was armed with a *bahi-khata*, which has figured very largely in the learned Judge's judgment and therefore cannot be treated as non-existent, although it certainly has not been formally proved, which purported to record the result of the partition signed by some of the predecessors of the respondents, and authorized Debi Dat to transfer or deal with, or otherwise effectually carry out the partition so far as the shares were concerned. He was also armed with the certificates, as we have said. He preferred, for reasons into which it is no business of ours to inquire, that his alleged holding should be distributed between various nominees of his own, possibly as rewards to these doubtless deserving individuals, possibly as an inducement to get votes at the annual meeting in case Debi Dat required the support of the shareholders. He therefore filled up the formal transfers with the names of his nominees as transferees, and executed the formal transfers in the names of the alleged transferors "by the pen of Debi Dat". He then approached the company, which in other words means the paid secretary, and it can surprise nobody in connection with the case that at his request the company made the necessary alterations in the register of shareholders Now if these shares had been lawfully sold or allotted to Debi Dat for good consideration by the respondents, nobody can complain of that transaction. If, on the other, hand they have never been partitioned or allotted in favour of Debi Dut and are the property of the respondents, he was perpetrating a gross swindle. So long as that question remains undecided, there is a question of title between shareholders of the company on the one hand, and alleged shareholders on the other. So far as the company is concerned we have been unable to

discover any question between the respondents as the former registered holders of the shares and the company, although we have constantly called upon the respondent's advocate to formulate such question. There would be a question, if the present respondents and former owners were still the owners of the shares, and a very grave question, but it would be merged in the question of title which we have already described between the two sets of contending owners. Although the articles of association prescribe certain conditions which have to be complied with to entitle a transferee, or proposing member of a company, to get his name on to the company's register as a member of the company, those are matters which the company may or may not insist upon. If the company insists upon them and an alleged transferee is not recognized as such by the company, and the company refuses to register his name, undoubtedly a question arises between him and the company, and he may apply under section 38 and compel the company to register his name; and then the question will arise whether he has complied with the articles or not, and whether the company has a right to insist upon conformity with the articles. But a company has always a right to accept such evidence as satisfies its mind that an applicant is really the owner and a real transferee and entitled to be registered, and it would be surprising if the company did not accept the word of its own managing director, especially if he produced any evidence in support of it.

There are some observations in the judgment, and some observations have been addressed to us in support thereof, which are so startling from the ordinary business point of view of the working of a company, that we find it difficult to deal with them in the course of this judgment. To suggest, as the learned Judge seems to suggest, that upon an alleged transferee presenting himself and his material to the company for registration, the company is not to do anything until it has given notice to the transferor and is to constitute itself an amateur court of inquiry with power to hear witnesses and examine documents, and goodness knows what, is really unreasonable, and if it were conceivable it would bring work in many companies to a standstill. Substantial companies in which shares are constantly

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changing hands would have the whole of their time taken up and their offices occupied by struggling transferors and transferees awaiting judgment. Dr. *Sen* seems to make it a grievance that the act of January, 1919, was done "behind his back". We are unable to understand what bearing this suggestion has. Of course it was done behind his back. The duty of a transferee is to get his shares registered and the name of the transferor removed from the register of shareholders. The duty obviously lies upon somebody. Nothing would be more embarrassing to an ordinary shareholder, after he has sold his share and forgotten all about it, than to find that his name still figured upon the register of shareholders, possibly exposing him to unforeseen liabilities, and therefore the Act has gone out of its way to give the transferor a statutory right to apply for rectification if the transferee and the company neglect their obvious duty in the matter. Why Dr *Sen* thinks that this section helps his argument we are at a loss to understand. In the circumstances above-mentioned and bearing in mind these general observations, the present respondents, discovering that they were not summoned at the last annual meeting, and being refused permission to vote, made this application to the learned Judge for rectification of the register. If they had proved to the satisfaction of the learned Judge that they were the owners of the shares and that the assertion of the right if Debi Dat was a mere sham, they would have been entitled to succeed If, on the other hand, the learned Judge had gone into evidence and examined the applicants' title and had decided against them, their application ought to have been dismissed. There was a *tertium quid*. The learned Judge was not bound, and some Judges have even expressed a doubt whether they are entitled, to decide in a proceeding of this kind a serious question of title In England the matter seems to have been more or less set at rest by the decision in *Ex parte Shaw* (1), that "it is a matter of discretion whether the court or Judge will exercise the summary jurisdiction. In a complicated or doubtful case, the jurisdiction ought not to be exercised; but when the legal title in the applicant is clear the order ought to be made." It is possible that in

(1) (1877) 2 Q. B. D., 463.

view of the slight judicial controversy in England, the final proviso to section 38 was added in India which finds no place in the English legislation. However, the learned Judge elected not to decide the question of title; indeed he held that he could dispose of the matter without doing so, and it is sufficient to say for this purpose that no sworn testimony of any sort or kind was given. The most informal evidence was laid before the learned Judge. Both parties before us seem to be agreed that a suit is sooner or later inevitable. Therefore we come to the conclusion that the learned Judge was perfectly right on the material which he had before him in declining to adjudicate on the question of title. It is the latter part of his judgment, after he leaves that question, where we are unable to follow him. What he thought he was really deciding, or what he thought the real object of the section was, we are unable to say. He seems to have failed to consider whether the question which he was dealing with was a question as mentioned in sub-section (3) of section 38 between members, or one between alleged members on the one hand and the company on the other. Having felt himself unable, and having declined, to adjudicate on the question of title, the only thing to do was to dismiss the application. Indeed the application was bound to fail unless the applicants chose to prove their title. No wrong has been done them, no infringement of any right of theirs has been committed by the company. Assuming that they were not the rightful owners of these shares, if the application was made independently of that question, it was wholly misconceived. We should have been prepared, if that view of the question had been taken by the respondents, to treat this as a matter which had gone off in the wrong direction and to make the costs of both sides in both courts costs in the suit, but, having regard to the tenacious way in which the appeal has been resisted by the respondents, we must allow the appeal with costs in both courts.

The respondents took a preliminary objection to the hearing of the appeal. That point really has given us more trouble than any other in the case. The section is certainly drafted in a singular form which gives colour to the objection raised on behalf of the respondents. The language used is that the court

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"may direct an issue to be tried in which any question of law may be raised" The plain English of that provision would suggest that the intention was that the ordinary jurisdiction of the Civil Courts for the determination of questions of title was to be ousted, but that view does not seem to have been taken in India and we express no opinion about it. At any rate the parties before us are prepared to seek a decision from the civil courts by suit. It is to be observed that the language used is not that the court may direct an issue of law to be tried, but "may direct an issue", and it then goes on to say that in that issue any question of law may be raised. We think that means that the court may direct an issue on the question, for example, of title, and in such issue a question of law may be raised. It then goes on to provide that an appeal from a decision of such an issue shall lie in the same manner as directed by the Code of Civil Procedure. We must give an intelligible meaning to the section. The Legislature can hardly have meant that if the learned Judge himself decided the question of title involving difficult and important questions of law there should be no appeal, but that if he sent it to somebody else in the form of an issue, his decision on the issue should be appealable. We think that it must mean that the decision, as the result of the issue, is the decision of the court. The issue may be tried by the Subordinate Judge or the Munsif or even a vakil appointed for the purpose, but the order passed under the section resulting from the issue would be the decision of the court, and from such decision or rather from the decision of such an issue, whether tried by the Judge or somebody else, an appeal lies in the manner provided by section 100. That means that the right of appeal is limited, as it is in second appeal, to a point of law. Nobody hearing Dr. *Sen's* argument could seriously doubt that a question of law was involved in the hearing of this appeal. The learned Judge clearly misdirected himself. In our view an appeal lies.

Appeal allowed.

REVISIONAL CRIMINAL.

1921
January, 4.

Before Mr. Justice Piggott and Mr. Justice Walsh
EMPEROR *v.* BIRJU MARWARI AND OTHERS.*

Criminal Procedure Code, section 9—Jurisdiction—Additional Sessions Judge—Appeal made over to Additional Sessions Judge, but afterwards withdrawn and tried by Sessions Judge.

In the district of Gorakhpur, besides the Sessions Judge, two Additional Sessions Judges were appointed. And it was provided by a Government notification that the Second Additional Sessions Judge should try such cases as were made over to him to be tried by the Sessions Judge. A particular appeal was so made over to be tried, but, before it was dealt with, the Sessions Judge called up the appeal on to his own file and disposed of it himself. *Held* that in so doing the Sessions Judge did not act outside his jurisdiction.

THIS was an application in revision, the only question raised by which was whether the Court of the Sessions Judge of Gorakhpur had, in the circumstances, jurisdiction to hear a certain criminal appeal. The facts of the case appear from the following order made by the Single Judge before whom the application was first placed:—

LINDSAY, J.:—I admitted this application on one ground, namely, that contained in paragraph 3 of the application. A question of jurisdiction is raised in the following circumstances.

The appellants were convicted by a Magistrate under sections 147 and 149 of the Indian Penal Code and they were also bound over under section 106 of the Code of Criminal Procedure. The appeal came up in the ordinary way before the Sessions Judge of Gorakhpur. The learned Sessions Judge directed the appeal to be transferred for trial to the Court of the Second Additional Sessions Judge of Gorakhpur.

He had authority to do this under a notification which was published in April last (No. 1652/VI—1037, dated the 23rd April, 1921).

After the appeal had been so transferred and before the Second Additional Sessions Judge had time to dispose of it, the learned Sessions Judge withdrew the case, took it on his own file and decided it.

* Criminal Revision No. 527 of 1921, from an order of R. L. Yorke, Sessions Judge of Gorakhpur, dated the 2nd of August, 1921.

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It is argued that the learned Sessions Judge, having once transferred the case to the Second Additional Sessions Judge, had no authority to withdraw the case and to dispose of it himself. I am inclined to the view that the learned Sessions Judge had no such authority, but I think it advisable that this question be referred to a Bench of two Judges for disposal. It is a matter which may easily come up again for decision, for there are numerous Judgeships in which Additional Judges are employed.

Let the case be put up as early as possible after the vacation.

The case then came up for hearing before a Bench of two Judges.

Mr. *T. N. Chadha*, for the applicants.

The Assistant Government Advocate (Mr. *R Malcomson*,) for the Crown.

PIGGOTT and WALSH, JJ.:—In the Court of Session of Gorakhpur, as established under section 9 of the Code of Criminal Procedure, there is a Sessions Judge and there are, or have been, also two Additional Sessions Judges. There was a criminal appeal filed by Birju and others against their conviction by a Magistrate. So far as the provisions of the Code of Criminal Procedure go any one of the Judges of the Court of Session competent to exercise jurisdiction in the said court could lawfully have heard that appeal. For the convenience of the administration the Local Government had limited the powers of the Second Additional Sessions Judge to the trial of cases or appeals made over to him by the Sessions Judge. This particular appeal was made over to the Second Additional Sessions Judge, but circumstances subsequently occurred which made it more convenient for the Sessions Judge to hear the appeal himself. After proper notice to the parties he proceeded to do so. The question has been raised whether in so doing he acted outside his jurisdiction. We find nothing in the Code of Criminal Procedure to suggest that the jurisdiction of the Sessions Judge of Gorakhpur in respect of this appeal had been ousted in consequence of any arrangement which he might previously have made for the convenient disposal of the work of that Sessions Court. We

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do not think this is a case of transfer. The expression used in the Notification is "made over to be tried" and section 9 of the Code of Criminal Procedure simply gives jurisdiction to all Judges and Additional Sessions Judges of each court of Session to which they may be appointed. If this appeal had been heard by a Judge who was not a Judge of the Sessions Division of Gorakhpur, section 531 of the Code of Criminal Procedure would have prohibited interference except upon the ground that a failure of justice had been occasioned by the hearing of the appeal in the wrong Sessions Division. We see no reason whatever for holding that there has been a failure of justice in this case. From one point of view it might be said that the provisions of section 531 aforesaid applied *a fortiori* to the present case. We are more inclined to hold that the absence of any corresponding provision in respect of cases tried within the same Sessions Division by a lawfully appointed Judge of that Sessions Division, whether he be the Sessions Judge or an Additional Sessions Judge, shows that the Legislature did not think that any doubt as to the jurisdiction of such Judges could arise in view of the wording of section 9 of the Code. We are satisfied that there is no cause for our interference. We dismiss this application.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokul Prasad and Mr. Justice Sulaiman.

1921
November, 5.

SHEO MANGAL (DECREE-HOLDER) *v.* MUSAMMAT HULSA AND OTHERS (JUDGMENT-DEBTORS)*.

Execution of decree—Res judicata—*Estoppel*—*Application of doctrine of* res judicata *or estoppel to proceedings in execution.*

A decree was passed in a pre-emption suit awarding possession to the plaintiff upon payment of Rs. 1,200 within two months. On appeal the amount payable by the plaintiff was increased by Rs. 880-15-0 and the time for payment was extended to five months from the appellate court's decree. The plaintiff deposited the amount declared by the original decree to be payable and obtained possession of the property in suit. The additional sum

* Second Appeal No. 641 of 1920, from a decree of B J. Dalal, District Judge of Allahabad, dated the 22nd of April, 1920, reversing a decree of Lal Gopal Mukerji, Judge of the Court of Small Causes, exercising the powers of a Munsif of Allahabad, dated the 26th of November, 1919.

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made payable by the appellate court's decree not having been paid, the vendees applied for execution of the decree. Their first application was dismissed for default. On the second application, which was for realization of the sum of Rs. 330-15-0 and costs, the plaintiff appeared and offered to pay Rs. 250 at once and the balance in two months, and this was accepted by the court, which passed orders accordingly notwithstanding the vendees' objection. Before the time so allowed had expired, the vendees put in a further application asking that the property in suit might be returned to them because the plaintiff had not complied with the terms of the appellate decree. The plaintiff thereupon deposited the balance of the sum due from him under the last order of the Court.

Held that neither the principle of *res judicata* nor the principle of estoppel debarred the vendees from taking up the position that, by reason of the plaintiff's failure to deposit the amount of the appellate court's decree within time, the suit *ipso facto* stood dismissed

Ram Kirpal v. *Rup Kuari (1), Lakshmanan Chetti* v. *Kuttayan Chetti (2), Sheoraj Singh* v. *Kameshar Nath (3), Dunbar Singh* v. *Munawar Ali Khan (4)* and *Kalyan Singh* v. *Jagan Prasad (5)* referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Shiva Prasad Sinha* for the respondents.

GOKUL PRASAD and SULAIMAN, JJ.:—This appeal arises out of an execution matter. It appears that the plaintiff appellant brought a suit for pre-emption against the defendants. That suit was decreed on the 29th day of February, 1916, by the court of first instance and the decree provided that on payment of Rs. 1,200 within two months the plaintiff would be entitled to get possession of the property. The vendee appealed to the District Judge and the plaintiff appellant filed cross-objections. The learned District Judge on the 12th day of August, 1916, allowed the vendee's appeal in part and increased the amount awarded to him by a sum of Rs. 330-15-0 and directed that in case the Rs 1,200 awarded by the first court had not already been deposited the time for payment of the whole or the balance be extended by five months from the date of his decree. There was a second appeal to this Court which was dismissed.

The plaintiff on the 29th day of April, 1916, deposited Rs. 1,200 in court and on the 30th day of May, 1916, obtained

(1) (1838) I L. R., 6 All., 269
(2) (1901) I L. R., 24 Mad., 669.
(3) (1902) I L. R., 24 All., 282.
(4) (1915) I. L. R., 37 All., 531.
(5) (1915) I. L. R., 37 All., 589.

possession of the property. He, however, did not deposit the balance of Rs. 380-15-0 within five months allowed by the court of first appeal. On the 17th day of July, 1918, the vendees applied for execution of their decree for costs. This application was ultimately dismissed for default. After this, on the 16th day of June, 1919, the vendees put in a second application for execution of the decree in their favour and claimed to recover a sum of Rs. 380-15-0 allowed by the District Judge, as well as costs to which they were entitled, and prayed for the execution of the decree by arrest of the judgment-debtor. An order issuing process was made on that day. Before the order could be executed, the judgment debtor appeared in court on the 13th day of July, 1919, and offered to pay Rs. 260 at once and prayed for two months' further time. The vendees' pleader objected to any further extension of time, but the court thought fit to direct that the judgment-debtor should deposit Rs. 260 on that date and should be allowed two months' further time to pay the balance. Before the two months had expired and before the balance had been deposited, the vendeee, on the 22nd day of August, 1919, put in an application, out of which this appeal arises, and which in effect was one for restitution of the property on the ground that, the pre-emption money not having been deposited within the time allowed by the decree, the suit stood dismissed. Two days before the date fixed for hearing of this application, namely, on the 18th day of September, 1919, the plaintiff appeared in court and deposited the balance of the amount.

Various objections were raised by the plaintiff to the vendees' application for restitution. The court of first instance was of opinion that this application was barred by the principle of *res judicata* as well as by the principle of estoppel, and it accordingly dismissed the application. On appeal the learned District Judge has differed from the views of the court of first instance, and having allowed the appeal, has granted the application for restitution of the property.

In the courts below there was some dispute as to the actual interpretation of the decree passed by the learned District Judge. The decree modified the decree of the court of first instance to this extent only that the period of payment be extended to five

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months and the amount of the pre-emption money be increased by Rs. 380-15-0. In other respects the decree of the court of first instance had not been modified. It is obvious, therefore, that the clause in the first court's decree, which said that in case of default of payment the suit should stand dismissed, held good and in our opinion there can be no doubt that on the failure of the plaintiff to deposit the full decretal amount within the time allowed by the learned District Judge his suit did stand dismissed.

On behalf of the plaintiff, however, two points have been strongly urged before us. One is that of *res judicata* and the other of estoppel. It is urged that when at the instance of the vendees the execution court ordered process to issue and also directed that the judgment-debtor should deposit the balance of the amount within two months, it substantially decided that the decree was executable and that the vendee's remedy was to recover the pre-emption money by execution of his decree, that therefore this point must be taken as having been decided by a competent court and the present application is barred by the principle of *res judicata*.

In is clear, however, that there is no express order to the effect that the decree could be executed even after the expiry of the five months. The order of the 16th day of June, 1919, is simply an order directing that process should issue. On that date there was the amount of costs actually due to the vendees and there can be no doubt that the execution court had jurisdiction to execute the decree. It is true that in the application for execution a larger amount than was actually due to the vendees was put in, but this circumstance in our opinion cannot oust the jurisdiction of the execution court so far as the amount actually due was concerned. It is clear, therefore, that the order of the 16th day of June, 1919, can in no way operate as *res judicata*. Coming to the incident of the 13th day of July, 1919, it will be noticed that, although on that date the vendees seem to have been willing to accept the whole of the decretal amount in case it was paid to them then, they were not willing to allow any further grace to the plaintiff. The court, however, in spite of the vendees' objection, granted two months' further time for

payment of the balance. This in effect was an order extending the time fixed by the decree. Section 148 of the Code of Civil Procedure has no application to time fixed by a decree, and it is obvious that the court really had no jurisdiction against the will of the vendees to extend the time for payment of the pre-emption money In our opinion this order, too, cannot be said to amount to an adjudication that the decree was really executable. The fact seems to be that it did not occur to either of the parties or to the court that by lapse of time the suit stood dismissed. It is strongly urged by Mr. *Banerji* on behalf of the plaintiff that if the court did not intend to decide that the only remedy of the vendees was to recover the amount by execution of their decree it would not have passed this latter order. He relies on the cases of *Ram Kirpal* v. *Rup Kuari* (1), *Lakshmanan Chetti* v. *Kuttayan Chetti* (2), *Sheoraj Singh* v. *Kameshar Nath* (3) *Dambar Singh* v. *Munawar Ali Khan* (4), *Tameshar Prasad* v. *Thakur Prasad* (5), and *Lachhmi Narain* v. *Ram Chandra* (6).

There can be no doubt that if an executing court expressly decides a point *inter partes*, that decision becomes final according to the general principles of law, though the question whether the law of *res judicata* applies would be irrelevant, as the term refers to a matter decided in another suit. This is all that was held by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1). In the case of *Lakshmanan Chetti Kuttayan Chetti* (2) there was an application for execution to which certain objections were raised and an order for the issue of warrant was issued. The application for some reason or other was struck off and, on a second application for execution having been made, a plea was raised that the previous application having been filed beyond time was not according to law. It was held that such a plea was barred by the principle of *res judicata*. That case is really distinguishable, inasmuch as certain objections had actually been raised by the judgment-debtor and for some reason or other had not been pressed and process

(1) (1868) I. L. R., 6 All, 269
(2) (1901) I. L. R., 24 Mad., 669.
(3) (1902) I. L. R., 24 All, 262.
(4) (1915) I. L. R., 37 All., 531.
(5) Weekly Notes, 1903, page 99.
(6) (1907) 4 A. L. J., 117.

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had been ordered to issue. In the case of *Sheoraj Singh* v. *Kameshar Nath* (1) also, the objections, including an objection as to limitation, had been raised to an application for execution, but the judgment-debtor failed to appear in support of those objections, which were accordingly dismissed. On a second application for execution being made the plea of the previous application having been barred by time was disallowed on the obvious ground that the point had been expressly raised on the previous occasion and not pressed. In the case of *Dambar Singh* v. *Munawar Ali Khan* (2) it appears that in the course of the execution proceedings a compromise had been arrived at, which was made the basis of an order by the court that the respondents were not liable for the decretal amount and that their property should be released. This order was also subsequently upheld. In spite of this, however, the decree-holder's transferees put the decree in execution and re-attached the same property. Objections were filed to the effect that the respondents were not liable and that their property could not be attached, but these objections were allowed to be dismissed for default. It was then held that the latter of these two orders operated as *res judicata*. In this case it will also be noticed that objections had expressly been raised and allowed to be dismissed and the order dismissing those objections had become final. From these rulings it does not necessarily follow that the principle of implied *res judicata* would apply to execution proceedings. On the other hand, it has been laid down in the case of *Kalyan Singh* v. *Jagan Prasad* (3), that if a judgment-debtor does not take any objection as to the decretal amount entered in the application for execution, that does not preclude him from raising the point at a subsequent stage.

All that happened was that on the 16th day of June, 1919, the vendees included an item of Rs. 380-15-0 to which they were not entitled. The judgment-debtor for some reason or other did not take any objection that this amount was not payable by him. The court also proceeded on the assumption that the amount was due and process was ordered to be issued. The

(1) (1902) I. L. R., 24 All., 282. (2) (1915) I. L. R., 37 All., 631

(3) (1915) I. L. R., 37 All., 589.

judgment-debtor appeared and offered to pay Rs. 260 and to pay the balance in two months. To this request of his the court acceded. In our opinion neither of these proceedings can be said to amount to an express adjudication by the court that the proper remedy of the vendees was to recover the amount of Rs. 380-15-0 by execution or that any such amount was actually due to him. The rule of *res judicata*, therefore, does not apply and the present application is not barred by such principle.

It has next been very strongly contended that the conduct of the vendees estops them from taking up a new position. It is urged that the vendees deliberately took up the position that their remedy was to recover the sum of Rs. 380-15-0 by execution of their decree and persuaded the court to pass orders in their favour, and that they by their conduct put the judgment-debtor to a great disadvantage in compelling him to find a sum of Rs. 260 and asking for time to pay the balance in two months. This point is certainly not free from some difficulty, because the conduct of the vendees is reprehensible and it is also clear that they are now trying to shift their position and go behind the previous application. We are, however, to be satisfied whether there is any rule of law which precludes them from claiming restitution. It is obvious that after the expiry of the five months allowed by the decree the suit stood dismissed, and it cannot be urged on behalf of the plaintiff that by any act or misrepresentation of the vendees the plaintiff was prevented from depositing the full amount within the time allowed by the decree. Without any fault of the vendees the plaintiff allowed the time fixed to expire and allowed the suit to stand dismissed. The subsequent conduct of the vendees cannot in our opinion amount to any misrepresentation on their part which has deceived the plaintiffs. Their conduct did put the plaintiff to a great disadvantage for which the plaintiff may have another remedy but in our opinion the circumstance that the vendees wanted to realize a sum of Rs. 380-15-0 by execution of the decree, which sum admittedly was not due to them, does not estop them from now coming to court and saying that they were pursuing a wrong remedy and that their real remedy is to recover possession of the property which has been wrongly taken by the plaintiff.

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In our opinion the order of the court giving the plaintiff two months' further time to deposit the pre-emption money was without jurisdiction and it was passed against the consent of the vendees. On that day the vendees seemed prepared to waive their right to some extent and were ready to accept the amount provided the whole amount was paid to them. This, however, was not done, and we can by no stretch of language say that the vendees ever agreed to accept the whole amount within two months after the 13th day of July, 1919. They are, therefore, entitled to insist that, inasmuch as the plaintiff did not deposit the whole amount on that day they cannot now be compelled to accept it In our opinion the effect of the default of payment made by the plaintiff was to dismiss his suit *in toto*, and he is, therefore, wrongfully in possession of the property. The vendees are entitled to a full restitution. We understand that the sum of Rs. 1,200 which had been deposited by the plaintiff and taken out by the vendees has already been re-deposited and that a further sum of Rs 380-15-0 is still lying in court. In these circumstances we are of opinion that the order of the learned District Judge granting the application was correct.

Having regard to the circumstances of the case and the peculiar attitude taken up by the vendees we direct that the parties should bear their own costs of the execution proceedings throughout. With this modification the appeal is dismissed.

Appeal dismissed

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November, 8

Before Mr. Justice Ryves and Mr Justice Gokul Prasad.

RAM BRIGHH RAI (JUDGMENT-DEBTOR) *v.* DEOO TIWARI (DECREE-HOLDER)*.

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182 (5), —Execution of decree—Limitation—Decree in part a mortgage decree and in part a simple money decree

In a suit against the members of a joint Hindu family based on a mortgage of the family property, it was found that a portion only of the mortgage debt was incurred for legal necessity. As to such portion as was supported by legal

* Second Appeal No 144 of 1921, from a decree of Baij Nath Das, District Judge of Ghazipur, dated the 14th of July, 1920, confirming a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 22nd of July, 1919

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necessity the usual mortgage decree was passed against all the defendants. Simultaneously a simple money decree for the balance was passed against the two executants of the bond in suit. The decree-holder first executed the decree, so far as it was a decree for sale, and then, within three years of this, though more than three years from the date of the decree, applied for execution of the simple money decree partly by arrest of one of the judgment-debtors.

Held that the application was within time. *Dhirendra Nath Sarkar* v. *Nischintapore Company* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *M. Ishaq Khan*, for the appellant.

Babu *Saila Nath Mukerji*, for the respondent.

RYVES and GOKUL PRASAD, JJ.:—This appeal arises out of execution proceedings. The predecessor in title of the decree-holder (respondent here) advanced a sum of money to Ram Brichh Rai, the appellant, and another member of his family, who were adult at the time, on the mortgage of their joint family property. The money not having been repaid, a suit was brought against the two executants of the mortgage bond and the remaining members of the joint family consisting of their sons and grandsons. The court found that a certain portion only of money lent was required for legal necessity and it passed a decree against all the defendants, including the present appellant, for repayment of the mortgage money, passing an ordinary mortgage decree for that amount, stipulating that if the sum was not paid within the stated time the family property or a sufficient portion thereof should be sold to recover it. For the balance of the money lent a simple money decree was passed against Ram Brichh Rai and the other executant only. Admittedly within three years of that decree that portion of the decree which related to the family property was made final, and execution was taken out and the property was sold. Admittedly again, within three years of the date of the application for execution by sale of the family property this application was made to execute the simple money decree against Ram Brichh Rai by arresting him. Ram Brichh Rai objected on the ground that the decree had become time-barred as against him. This objection was overruled by both the courts; hence this appeal.

It is strenuously argued by Mr. *Ishaq Khan* that this decree really was two decrees, although written on one piece of paper,

(1) (1916) 36 Indian Cases, 398.

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and it was argued that execution of the mortgage decree could not keep alive the simple money decree against the appellant; and great stress was laid on the case of *Dhirendra Nath Sarkar* v. *Nischintapore Company* (1) reported in Indian Cases and apparently nowhere else. It seems to us, however, that that case is really quite different. There, the plaintiff brought a suit to recover from the defendant three separate sums of money due on three separate contracts of tenancy and he obtained a decree formally awarding him separate amounts with regard to the three tenancies The plaintiff, in executing his decree, first of all applied to recover the specified sum awarded with regard to one particular tenancy. Subsequently he applied, after three years from the original decree, to execute his decree with regard to the money decreed with respect to another tenancy, and it was held that that application was time-barred, the reason being that in fact there were three separate suits consolidated and tried together and the result expressed on one piece of paper, but that in reality there were three separate decrees, each capable of execution quite independently of the others. Now in this particular case, as we have pointed out, all the defendants were included in the mortgage decree. All the defendants were, therefore, bound to pay that amount, and on failure to do so the family property which belonged to all of them was liable for sale. The remainder of the money was found due from two only of the defendants, who were liable not only for this amount but also for the amount which had been borrowed for legal necessity This circumstance seems to us to distinguish this case altogether from the Calcutta case already quoted, and the other cases, also, of this Court which have been referred to in argument In all of them the decrees were passed against separate individuals In this case the decree was passed against all the defendants with regard to part of the mortgage money and this, too, with regard to the same property. It seems to us that this was really one decree for the whole of the mortgage money, and this second application having been made within three years of the first application in which these persons were also parties, keeps the decree alive. We, therefore, think that the decision of the

(1) (1916) 38 Indian Cases, 993.

courts below must be affirmed, but as we do not agree entirely with the reasons given by the learned District Judge we make no order as to the costs of this appeal.

Appeal dismissed.

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RAM BRICHH RAI v. DEGO TIWARI

Before Mr. Justice Piggott and Mr. Justice Walsh.

MATHURA PRASAD (DEFENDANT) v. RAMESHWAR AND ANOTHER (PLAINTIFFS)*.

1921 *November*, 9.

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 158—*Rent-free grant in favour of an idol*—"*Two successors to the original grantee*"—*Whether successive priests in office can be deemed to be such successors*

Where property is given rent-free to an idol at a particular shrine, as distinguished from the priest of the shrine, it is not open to the priest for the time being, after the lapse of a certain time, to claim the benefit of section 158 of the Agra Tenancy Act upon the ground that the property had been held by two or more successors to the original grantee. *Bharat Das* v. *Nandrani Kunwar* (1) referred to.

THESE were two appeals under section 10 of the Letters Patent. The facts out of which the matter for determination arose are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji* and Munshi *Bhagwati Shankar*, for the appellant.

Dr *Kailas Nath Katju*, for the respondent.

PIGGOTT and WALSH, JJ.:—These are two connected appeals arising out of two connected suits which have been litigated together throughout. The appeals may be disposed of by a single judgment. The suits were filed in the court of an Assistant Collector. The plaintiff, as lambardar and proprietor of two specified plots of land, sued the defendant as a rent-free grantee of the same and, admitting himself not to be entitled to resume the grant, claimed assessment of rent on the same. The written statement, as is often the case, was somewhat loosely drawn up, but beyond all question the substantial defence on the facts was that the defendant being a rent-free grantee of the land in question, had held the same as such for more than fifty years and through at least two successors to the original grantee and was, therefore, entitled to be declared proprietor of the same and to be assessed to revenue but not to rent. This refers, of course, to the provisions of section 158 of the Tenancy Act (Local Act II of 1901). The Assistant Collector who tried the

* Appeal No. 12 of 1921, under section 10 of the Letters Patent.

(1) (1917) I. L. R., 39 All., 689.

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two suits accepted this defence as established in fact and in law, and framed his decrees accordingly. On first appeal the District Judge reversed the finding of the first court on this precise point. He held that the defendant, however long he may have been in possession of the plots of land in suit, had certainly not held the same through two successors to the original grantee. He remitted issues on the question of the rate of rent payable, and finally decreed the plaintiff's suit, assessing rent on the two plots of land on the basis of the rent paid by tenants without right of occupancy in respect of similar plots of land in the neighbourhood. The defendant appealed to this Court. His memorandum of appeal raises various points, but he did beyond question challenge the finding of the lower appellate court with regard to the applicability of section 158 of the Tenancy Act. He also pleaded that, in any event, the rent assessed should have been on the basis of a finding that he had at least a right of occupancy in respect of the land in suit. The judgment of the learned Judge of this Court who disposed of the two appeals shows that the arguments before him wandered over a somewhat wide field and that the essential points in dispute had become somewhat overlaid and thrust out of sight by the time he came to deliver judgment. It seems to have been contended before him that the suits in question were not cognizable by a Rent Court, a contention which he had no difficulty in repelling. Obviously the suits as brought were suits under Chapter X of the Tenancy Act and cognizable by a Rent Court only. The plaintiff had to make out the essential facts alleged by him in order to bring the suits within the operation of the chapter. If he failed to do this the suits would be dismissed upon the findings of fact, but the suits as brought were unquestionably cognizable by the court which tried them.

Finally, the learned Judge of this Court affirmed the decision of the District Judge and, after remitting further issues regarding the rate of rent, passed orders the effect of which was to dismiss the appeal. The memorandum of appeal before us again raises the two principal points which have been already referred to. There is, however, a further plea which may be said to raise once more in a slightly modified form the question which was

discussed by the learned Judge of this Court as one of jurisdiction. The argument laid before us on this point may be stated in two slightly different forms. Firstly, it was contended that the original grant in favour of the defendant was not the grant of a rent-free holding, but a gift of the proprietary rights in the land itself. In our opinion there is no basis for this contention, either in the pleadings, or in the findings of fact recorded by the lower appellate court. The suggestion is that the description of the land in the revenue papers, and the use of the word 'Shankalap' as a description of the nature of the grant in favour of the defendant, necessarily involve a transfer of the proprietary rights in the land itself in favour of the latter. In order to maintain such a contention in second appeal, and even more so in an appeal under the Letters Patent, it would be incumbent on the person raising it to plead, and to show from the record, that documentary evidence establishing his contention of fact had either been disregarded by the court of first appeal or misinterpreted.' There has never been any pleading to this effect from first to last. Moreover, the defendant's written statement in the trial court, fairly interpreted, amounts to an admission of the fact that his position was that of a rent-free grantee and nothing more.

Secondly, the point is put in this way, that the provisions of section 151 of the Tenancy Act cover this case, because it should be held on the evidence that the defendant acquired this rent-free holding for valuable consideration and that the right of resumption is now barred. Here again we may say that we should find it very difficult to read any such contention into the pleadings, as they stood either in the trial court or in the court of first appeal; but in any case we are clearly of opinion that the facts before us would not warrant a finding that there had been "valuable consideration" in favour of the grantor at the time of the grant.

Passing over these points, we may now come to the two main questions which have been in issue throughout. The learned District Judge has found that the land in question, although it has no doubt been in the possession of the defendant for a long time, presumably for more than fifty years, has not been held by

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two successors to the original grantee. The contention before us is that this is a mixed finding of fact and of law and that the conclusion of the learned District Judge is vitiated by an error of law on his part. In this connection our attention has been drawn to a reported case, to which one of us was a party, that of *Bharat Das* v. *Nandrani Kunwar* (1). The judgment of the lower appellate court certainly suggests that the learned District Judge was not aware of this ruling, and we have had to consider it carefully, with reference to the findings arrived at by the court of first appeal, and to some extent with reference also to the pleadings and to the evidence on the record. We are satisfied that the present case is clearly distinguishable on the facts from the case of *Bharat Das* v. *Nandrani Kunwar* (1). In the judgment of that case particular stress is laid upon the fact that the original rent-free grant was in favour of the head or manager of a certain religious institution, although made for the benefit of a local shrine under the management of that institution. On those facts it was held that successive Mahants, or heads of a religious institution of this sort, may fairly be held to be "successors" to the original grantee, within the meaning of section 158 of Local Act II of 1901. The learned Judges expressed themselves with great caution and were at pains to limit the decision to the particular facts before them. We may go so far as to say that they felt that they were stretching the wording of section 158 aforesaid about as far as it could go and that they guarded themselves carefully against being supposed to lay down any principle which would stretch it too far. In the present case the finding is that the grant was in favour of the idol worshipped in a certain local shrine and this finding is borne out by the pleadings and by the evidence. We have come to this conclusion after carefully examining the record and in spite of the fact that there is some ambiguity about the form in which the plaint has been drawn up. We do not think that under the circumstances the particular priest who for the time being may be in charge as manager of the affairs of the temple in question, or of the worship of the idol as conducted therein, can be regarded as himself the grantee within the

(1) (1917) I. L. R., 39 All., 683.

meaning of the section above referred to, or that any priest who from time to time may succeed to the office can be treated as a successor to the original grantee within the meaning of the same section. This contention, therefore, in our opinion fails.

The only remaining point is as to the rate of rent. We are satisfied that we must modify the decree of the learned Judge of this Court. It certainly looks to us as if some confusion must have crept into the record when this Court came to re-examine it after the findings on the issues remanded by it had been returned. It is quite clear to us on the evidence that the defendant is entitled to be treated as an occupancy tenant of the land and to have rent assessed on the basis of the rent paid by occupancy tenants for land of similar quality in the neighbourhood. In fact, no serious argument to the contrary has been pressed upon us on behalf of the plaintiffs respondents. We have looked at the remand findings for ourselves and considered their bearing on the issue regarding the rate of rent. The result is that in our opinion the rent assessed on the plot of land of one bigha, five biswas, which is involved in the suit to which Letters Patent Appeal No. 12 of 1921 relates, should be fixed at Rs. 1-12-6 per annum; while on the plot of land of one bigha, four biswas, which is involved in the suit to which Letters Patent Appeal No. 13 of 1921 relates, the rent should be fixed at Rs. 1-11-5 per annum. We order that the decree of this Court, and also that of the lower appellate court, be modified to this extent, that the rent payable by the defendant be fixed as above stated. The result is that these two appeals have succeeded to a certain limited extent. We think the justice of the case will be fairly met if the parties bear their own costs of both the hearings in this Court, and we order accordingly.

Decree modified

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Before Mr. Justice Ryves and Mr Justice Gokul Prasad.

RAMESHWAR DAS (SURETY) *v.* SRI LAL (DECREE-HOLDER).*

Civil Procedure Code, section 145—Liability of surety for production of judgment-debtor—Failure to produce judgment-debtor due to his having been sentenced to imprisonment in a criminal case—Knowledge of surety that criminal case was pending.

In order to procure the release of L, who had been arrested in execution of a decree, one R gave a bond to the Court for the production of L when called upon, and in case of default, for payment of the amount of the decree under which L had been arrested At the time when R executed the bond criminal proceedings were, to R's knowledge, pending against L, and by the time that R was called upon to produce L in Court, it was impossible to do so because L had been sent to jail *Held* that in the circumstances the surety could not be excused for his inability to produce the judgment-debtor, inasmuch as the possibility or even the probability of his being sent to jail must have been within the surety's contemplation *Krishnan Nayar* v. *Ittiman Nayar* (1), *Ashiq Ali* v *Moti Lal* (2) and *Nabin Chandra Hasari* v. *Mirtunjoy Barick* (3) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Mohan Lal Sandal*, for the appellant.

Munshi *Narain Prasad Asthana*, for the respondent.

RYVES and GOKUL PRASAD, JJ.:—This appeal arises out of execution proceedings. One Sri Lal obtained a decree against Lakhpat Rai for some money and in execution of his decree had Lakhpat Rai arrested and brought to court. Thereupon Rameshwar Das, the appellant, got Lakhpat Rai released from custody on his undertaking to produce him whenever the court required, and gave a surety bond to the court in which he bound himself that on failure to carry out his promise to produce Lakhpat Rai whenever required by the court, he would himself pay the amount decreed against Lakhpat Rai. This bond was executed on the 8th day of January, 1920. It may be noted here that at that time criminal proceedings were pending against Lakhpat Rai on a charge of embezzlement on the complaint of Sri Lal and in those proceedings Rameshwar Das himself went bail for Lakhpat Rai. The court gave Rameshwar Das one month's time for the

* Second Appeal, No. 195 of 1921, from a decree of T K Johnston, District Judge of Agra, dated the 18th of January, 1921, reversing a decree of Banwari Lal, Munsif of Agra, dated the 7th of July, 1920.

(1) (1901) I. L. R, 24 Mad, 687. (2) (1907) 4 A. L. J., 497
(3) (1913) I L. R, 41 Calc, 50

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payment of the money and directed him to produce Lakhpat Rai on the expiry of the month. The month expired on Sunday the 8th day of February, 1920. On the 9th day of February Lakhpat Rai was convicted by the Criminal Court and sentenced to undergo three months' rigorous imprisonment and to pay a fine of Rs. 1,000 or, in default, to suffer six months' imprisonment. It was also ordered that if the fine or any portion of it were paid, that amount would be paid to Sri Lal as compensation. On the 9th day of February, 1920, Rameshwar Das put in an application to the court, stating that, inasmuch as Lakhpat Rai had been that morning sent to jail it was impossible for him to produce him in the Civil Court and prayed that he be discharged from his bond. No order appears to have been passed on that application, but subsequently when the decree-holder, Sri Lal, applied for process against the surety the same objection was raised by him and accepted by the executing court. On appeal, however, the learned District Judge has overruled the objection and directed execution to issue against the surety. Hence this appeal.

It is argued that the fact that Lakhpat Rai was in jail on the day on which the surety should have produced him was beyond the contemplation of anybody when the surety bond was executed, and that circumstances over which the parties had no control prevented the surety from producing Lakhpat Rai, and reliance was placed on the cases of *Krishnan Nayar* v. *Ittinan Nayar* (1), *Ashiq Ali* v. *Moti Lal* (2) and *Nabin Chandra Hazari* v. *Mirtunjoy Barick* (3). In all those cases the circumstance that prevented the surety from carrying out his promise was the death of the judgment-debtor. That was not so here. It can scarcely be said that Rameshwar Das could not have contemplated the possibility, or perhaps even the probability, of Lakhpat Rai being in jail within a month of his executing his surety bond when he knew that at that time criminal proceedings were going on against Lakhpat Rai. We, therefore, agree with the learned District Judge in holding that the rulings relied on do not cover this case.

(1) (1901) I. L. R., 24 Mad., 637. (2) (1907) 4 A. L. J., 437.

(3) (1913) I. L. R., 41 Calc., 50.

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We are informed that Lakhpat Rai has not paid up any portion of his fine and that there is no likelihood whatever of his ever doing so. Be that as it may, it seems to us that if the fine or any portion of it is realized and paid over to Sri Lal as compensation, then to that extent Rameshwar Das will have a right to get a refund from the decree-holder.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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GOKUL PRASAD HAR PRASAD (DEFENDANTS) *v.* RAM KUMAR (PLAINTIFF)*

Civil Procedure Code (1908), sections 107, 151; order XLI, rule 23—Remand—Inherent powers of court to order remand—Appeal from remand under inherent powers—Scope of order XLI, rule 23

In a suit for rendition of accounts of certain partnership transactions, the court appointed a commissioner to examine the accounts and on the basis of his report passed a preliminary decree. The plaintiff appealed to the Court of the District Judge, who remanded the case to the first court for re-trial, but without definitely stating under what provision of the Code of Civil Procedure he did so. On appeal from this order it was contended that no appeal lay, the order of remand having been passed, not under order XLI, rule 23, but under the inherent powers of the court apart from order XLI.

Held that it was not necessary to decide whether such inherent powers of remand as may have been exercised by High Courts from time to time were or were not possessed by District Judges; but, inasmuch as the policy of the Court had always been to allow as wide a meaning as was reasonably possible to the provisions of order XLI, rule 23, the remand might be taken to have been made under that order.

Observations as to the inherent powers of remand possessed by High Courts. *Ghusnavi* v. *The Allahabad Bank, Ld.*, (1) and *Habib Bakhsh* v. *Baldeo Prasad* (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. B. E. O'Conor, Dr. *S. M. Sulaiman*, Mr. *A. P. Dube* and Dr. *Kailas Nath Katju*, for the appellants.

MR *S. A. Haidar* and Munshi *Kumuda Prasad*, for the respondent.

PIGGOTT, J.:—This is an appeal against an order of remand passed by the District Judge of Cawnpore under the following

* First Appeal No. 22 of 1921, from an order of E. H. Ashworth, District Judge of Cawnpore, dated the 16th of November, 1920.

(1) (1917) I L. R., 44 Calc., 929. (2) (1901) I L. R., 23 All., 167.

circumstances. The plaintiff alleged that he was the proprietor of a certain trading firm and that, in this capacity, he had entered into a number of partnership transactions with the defendants' firm, extending over a period stated in the plaint itself. He complained that he was unable to get proper accounts from the defendants; he desired either an order that the partnership be dissolved, or a finding that it had already been dissolved, and that a proper and complete account from the defendants' firm be rendered. Reading between the lines of the plaint, it is fairly obvious that this was one of those unfortunate cases in which the plaintiff has very little chance of proving his claim except by means of documentary evidence in the possession of the defendants, in this case by means of account-books in the possession of the defendants' firm. The written statement denied various allegations of fact contained in the plaint, but there was a plain admission that there had been partnership dealings between the parties during certain years. The issues originally fixed by the trial court, although drawn up in somewhat general terms, seem fairly to cover the questions raised by the pleadings of the parties. That court then proceeded to appoint a commissioner to examine accounts, and handed over to him for examination and report the account-books which had been placed before the court by the plaintiff and by the defendants, respectively. It is by no means clear from the record that the production of these account-books was accompanied by any affidavit, or sworn testimony, to the effect that the accounts produced by the various parties were original and genuine, or that they included the whole of the documents in the possession of either party bearing on the partnership transactions. The commissioner submitted a report favourable on the whole to the defendant's case. The plaintiff raised a number of objections. The findings on these points were in favour of the acceptance of the commissioner's report as it stood, and the court then proceeded to draw up a very lengthy preliminary decree, in which the substance of the findings arrived at is embodied and also various matters, such as the appointment of a commissioner for a further examination of the

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documentary evidence and the preparation of a final account between the parties, have been embodied, which might well have been left out of the preliminary decree and dealt with by the court in a subsequent order. The plaintiff appealed to the court of the District Judge. His memorandum of appeal is a lengthy document, but in substance he objected that he had been prejudiced by the procedure followed by the trial court. He suggested that the commissioner's report should not have been accepted as sufficient evidence to prove all the points which the trial court had determined in favour of the defendants. He protested against the finding that the plaintiff's books of account were unreliable and could not be treated as proving any part of the plaintiff's case. There is a paragraph obviously intended to suggest that the account-books put in by the defendants, and acted upon by the commissioner, were not really the original accounts of the transactions in question, but account-books specially written up for the purpose of this case. This appeal raised first of all the question whether the plaintiff had been prejudiced by any error of procedure in the trial court; secondly, the question whether the findings of that court embodied in the preliminary decree were fairly sustainable on the evidence on the record. The learned District Judge seems to have been oppressed by his belief that the trial in the first court had not been a satisfactory one. He takes a point—it does not appear to be raised by the pleadings of either party—as to whether there really was a partnership in the proper sense of the word at all. He inclines to the view that there had been a disconnected series of partnership transactions. It is difficult to see on what he bases this opinion. There had been undoubtedly a number of partnership transactions, extending over a considerable period of time; but so far as the case has gone at present, it would seem that all those transactions were governed by an original agreement as to the terms on which the parties were to deal with one another, and, if that is so, there seems no reason whatever why the suit should not be treated, as both the parties were quite willing to treat it

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in the trial court, as an ordinary suit for dissolution of partnership and rendition of accounts. Moreover, the learned District Judge himself admits that the point is a purely academic one, because, even in his view of the case, the plaintiff would have been allowed to join his various causes of action in respect of each separate transaction in a single suit. I can find nothing in this to justify interference with the procedure of the trial court. Then the learned District Judge thinks that the plaint required radical alterations before justice could be done between the parties and that both parties ought to have been required to amend their pleadings. There was no petition to this effect on the part of the plaintiff, either in the trial court or before the lower appellate court itself, and my examination of the record, so far as it has gone, does not disclose any adequate reason for holding that the suit could not have been fought out on the pleadings and on the issues framed by the trial court. In effect the lower appellate court has not dealt with any of the substantial pleas raised by the memorandum of appeal before it. It brushed aside the whole proceedings of the trial court as unsatisfactory, set aside the preliminary decree and sent the case back for a new trial.

At the hearing of this appeal a point was taken on behalf of the plaintiff respondent, to the effect that no appeal lies to this Court from the order in question. The contention is that only an order of remand passed under the provisions of order XLI, rule 23, of the Code of Civil Procedure is open to appeal as an appeal from order, that in the present case the order of remand does not purport to be passed under that rule and cannot be regarded as covered by the terms of that rule. From this it is contended further that the lower appellate court must be presumed to have acted in virtue of the inherent powers of an appellate Court and on the strength of the recognition given by section 151 of the present Code of Civil Procedure to the existence of certain inherent powers in all courts. There has been considerable conflict of judicial opinion on the question of this alleged inherent power of an appellate court to remand a suit for retrial. This High Court has undoubtedly exercised a very general power of remand, not necessarily troubling itself to

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consider whether the remand order in every case was covered by the provisions of order XLI, rule 23, of the Code of Civil Procedure; but the High Court possesses wide powers of supervision not necessarily possessed by the courts of District Judges. In the High Court at Calcutta, after various conflicting decisions, the point was finally settled by a Full Bench in the case of *Ghuznavi* v. *The Allahabad Bank, Limited* (1), in favour of the existence of an inherent power of remand, independent of the provisions under section 107 of the Code of Civil Procedure or of order XLI, rule 23, of the same Code. There is one reported case of this Court, *Habib Bakhsh v. Baldeo Prasad* (2), in which a very similar view seems to have been taken. There has, however, so far as I am aware, never been a Full Bench decision of this Court on the subject, and it would not be difficult to quote rulings in which orders of remand purporting to be under order XLI, rule 23, of the Code of Civil Procedure have been set aside on the ground that they were not warranted by the terms of that rule. I regard the whole question, so far as this Court is concerned, as still somewhat unsettled. Further, the respondent has to contend that when a court of first appeal passes an order of remand on the strength of this presumed inherent jurisdiction no appeal lies to this Court from that order. He has quoted three cases in support of this contention, only one of which, *Raghunandan Singh* v. *Jadunandan Singh* (3), has found its way into any of the authorized reports. The other two are *Mohendra Nath Chakravarti* v. *Ram Taran* (4), and *Vijayaraghava Reddi* v *Komarappa Reddi* (5). Not only is there no authority of this Court to this effect, but there have been beyond all question numbers of decisions in which this Court has entertained, without question raised, appeals from orders of remand where, on the very face of the record, the remand order either did not purport to be under order XLI, rule 23, of the Code of Civil Procedure, or could only with great difficulty be brought within the purview of that rule. In the very case above referred to, that of *Habib Bakhsh* v. *Baldeo Prasad* (2), this

(1) (1917) I. L. R., 44 Calc, 929.
(2) (1901) I. L. R., 23 All., 167.
(3) (1918) 3 Pat. L. J., 253.
(4) (1919) 23 C. W. N., 1049.
(5) (1912),15 Indian Cases, 867.

Court considered on the merits the propriety of the order of remand under appeal before it even while holding that the provisions of the former Code of Civil Procedure now embodied in order XLI, rule 23, did not cover the case and that the court must be presumed to have acted in the exercise of inherent jurisdiction.

A further question arises out of the appellant's contention, and that is whether, in the event of our agreeing that the order before us is not an order against which a first appeal is allowed, it would not *ipso facto* become a decree, within the meaning of the definition in section 2 of the Code of Civil Procedure and be subject to a second appeal. It is not a complete answer to this contention to say that the appeal before us has not been filed as a second appeal, because it would obviously be open to us to allow the appellants an opportunity of amending the heading of their memorandum of appeal and paying an additional court fee, if we thought such a course was absolutely necessary in order to give us jurisdiction to deal with this matter. After giving full consideration to the various arguments which have been addressed to us, I do not propose to pronounce a definite decision on the general question of the existence of an inherent right of remand in the Court of District Judges, or as to the appealability of orders of remand passed in the exercise of such a presumed right. In all the decisions in which this inherent right of remand has been recognized the learned Judges have taken considerable pains to lay down that such a right, assuming it to exist, must be exercised with great caution and only under exceptional circumstances. If the learned District Judge in the present case had given detailed reasons for holding that in the interests of justice and after due regard to the provisions of section 99 of the Code of Civil Procedure, he felt that he could not deal with this litigation satisfactorily by the exercise of any of the powers conferred upon him by order XLI, rules 23 to 29 (inclusive), of the Code of Civil Procedure, and felt compelled to fall back upon a power inherent in his court, and recognized by section 151 of the Code of Civil Procedure, it would then have been necessary for us to record a definite finding on the objection raised by the present respondent to the entertainment of this appeal. The present case we propose to dispose of by saying simply

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that we see no adequate reason for treating the order under appeal as an order passed in the exercise of any inherent jurisdiction which the learned District Judge of Cawnpore believed himself to possess. He does not purport to be exercising such inherent jurisdiction and has not attempted to give any reasons for so doing. The policy of this Court has always been to allow as wide a meaning as is reasonably possible to the provisions of order XLI, rule 23, of the Code of Civil Procedure, and I am not satisfied that the learned District Judge did not conceive himself to be acting simply under those provisions. On these grounds we have determined to set aside the preliminary objection taken by the respondent and proceed to dispose of this appeal.

As regards the appeal itself, I do not think that the order of remand before us was justified by the pleadings in the lower appellate court, or that the learned District Judge has given adequate reasons for passing such an order In my opinion the case must go back to that court in order that the appeal may be reheard and disposed of in some different way. It will be open to the learned District Judge to consider whether each and all of the directions which the trial court has embodied in its preliminary decree is either (1) a proper subject-matter for inclusion in such a preliminary decree, or (2) adequately supported by evidence on the record. It will be open to him, further, to consider any application that the plaintiff may make, even at this stage, asking for a fuller, more formal and more regular disclosure of documentary evidence on the part of the defendants and for a further inquiry on the merits into the question of the genuineness and reliability of the accounts produced by himself and by the opposite party, respectively. The District Judge, being seised of the appeal, has power to look into this matter and to consider whether the plaintiff can make out a good case for the admission of fresh evidence on appeal, the nature of the evidence to be thus admitted, the court before which such evidence requires to be taken and so forth. The questions really at issue between the parties are shown by the order of the District Judge himself to lie within a fairly narrow compass and it ought to be possible to arrive at an adjudication on the merits without in effect ordering the suit to

be tried all over again, as the learned District Judge has attempted to do. I would, therefore, set aside the decree or order under appeal, and send the case back to the District Judge of Cawnpore, with directions to re-admit the same on to his file of pending appeals and to dispose of it. I think that the costs here and hitherto should be costs in the cause, that is to say, should be left to be dealt with in the discretion of the lower appellate court, after there has been further inquiry into the merits of the case, when that court will be in a better position than we are at present to determine how the costs of the litigation should be equitably assessed between the parties.

WALSH, J.:—I entirely agree. I only want to add a word which might be of practical service in other cases. The machinery for discovery contained in the Code of Civil Procedure is practically the same as contained in the rules of the Supreme Court of England. It is the result of years of practical experience and is invariably found to work well, if understood. It is provided and intended for all cases, but it is peculiarly appropriate and essential for such cases at this, where the plaintiff suing for an account may be either one partner suing another, or an agent suing his principal who keeps no account of his own and is necessarily without the requisite materials and documentary evidence which are necessary for framing issues and certainly for proving his claim. The first step which he ought to take is to apply to the court (and the rules are abundantly sufficient for the purpose) to compel his opponent to disclose on oath all the materials and relevant documents in his (the defendant's) possession and to produce them for inspection before the trial, or he may apply for the appointment of a commissioner; otherwise the court to some extent, and the parties themselves, have merely to grope in the dark and feel their way without the vital materials for the decision of the case. Once the parties have disclosed and provided to one another and to the court, all the materials and documents which are relevant as between themselves, the settling of the issues to be determined and the point in controversy ought to be and does become a perfectly simple and almost automatic matter. Certainly none of the tangles which have arisen in this case would have occurred if the proper

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procedure had been followed. To this extent I regard the plaintiff and his advisers responsible for all the trouble which has arisen in this case. It is hoped that, at any rate in Cawnpore, the legal practitioners will make some effort to acquaint themselves with the necessary information for carrying on their business and advising their clients properly. No legal practitioner with a grain of common sense in a claim of this kind ought to allow his client to go to court for trial without the available materials and the relevant documents. It is heart-breaking, to me at any rate, to see how lawyers, practitioners and men of business go blindly along a beaten path without giving themselves the trouble to understand what their clients really want and without availing themselves of the machinery which the Legislature has provided with such scrupulous care. As regards this particular case these observations are only relevant on the question of costs, because the mischief has been done. Speaking for myself, if I found that, in the ultimate result, the plaintiff had gained very little from the appeal which he has brought from the first court together with all the subsequent proceedings which have arisen out of it, I would saddle him with costs of those proceedings, which I regard as due to his own neglect or to that of his legal advisers. If, on the other hand, in the result it turns out that the plaintiff is entitled to a great deal more than he has got or that the defendant has been wilfully concealing the relevant materials, then certainly it would be just to punish the defendant because he had not disclosed the relevant material. I entirely agree with the order.

BY THE COURT:—Our order, therefore, is that we set aside the decree or order under appeal and send the case back to the District Judge of Cawnpore, with directions to re-admit the same on to his file of pending appeals and to dispose of it. We direct that the costs here and hitherto should be costs in the cause, that is to say, should be left to be dealt with in the discretion of the lower appellate court after there has been further inquiry into the merits of the case, when that court will be in a better position than we are at present to determine how the costs of the litigation should be equitably assessed between the parties.

Order set aside and cause remanded.

PRIVY COUNCIL.

*P. C.
1921
December, 9.

MUHAMMAD SHER KHAN (APPELLANT) *v.* RAJA SETH SWAMI DAYAL (RESPONDENT).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Right to redeem—Deed excluding right—Anomalous mortgage—Statutory right—Transfer of Property Act (IV of 1882), sections 60, 98.

Immovable property was mortgaged by deed for five years to secure a debt. The deed provided that the mortgagor was to redeem at the end of the five years, and that if he did not do so the mortgagee was to have the option of taking possession for a period of twelve years. If the mortgagee took possession, it was provided that during the period of twelve years the mortgagor was not to be entitled to redeem, but that at its conclusion he was to do so. The mortgage debt not being repaid at the end of five years, the mortgagee took possession; in the same year the mortgagor sued to redeem.

Held that the mortgagor had by section 60 of the Transfer of Property Act, 1882, a statutory right to redeem, whether or not the mortgage was one in which by section 98 the rights and liabilities of the parties were to be determined by their contract.

Judgment of the Court of the Judicial Commissioner reversed

CONSOLIDATED Appeals (No. 6 of 1921) by special leave from two judgments and decrees (February 9, 1915, and June 19, 1918) of the Court of the Judicial Commissioner affirming two decrees of the Subordinate Judge of Kheri.

The question for determination in the appeals was whether the appellant, the mortgagor under a deed, dated the 9th day of June, 1908, had a right to redeem having regard to the terms of the deed, which excluded the right at the time when it was sought to be exercised.

The terms of the mortgage and the material facts appear from the judgment of the Judicial Committee.

The Subordinate Judge, and on appeal the Court of the Judicial Commissioner, had held that, having regard to the terms of the mortgage deed, the mortgagor had not a right to redeem during the period of twelve years if the mortgagee had elected to go into possession for that period.

1921, November 10th.—*Upjohn, K. C.*, and *Dube* for the appellant.—The mortgage was a simple mortgage and was not an anomalous mortgage to which section 98 of the Transfer of

* *Present*:—Lord BUCKMASTER, Sir JOHN EDGE, Mr. AMEER ALI, and Sir LAWRENCE JENKINS.

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Property Act, 1882, applied. But whether it was so or not, the mortgagor had a right to redeem under section 60 of that Act. Any provision to the contrary in the deed was a clog on the equity of redemption; it could not take away the statutory right given by section 60. Reference was made to *Lingam Krishna Bhupati* v. *Maharaja of Vizianagram*, (1).

De Gruyther, K. C., and *Parikh* for the respondent.—This was an anomalous mortgage to which section 98 of the Transfer of Property Act applied. The rights of the parties are governed by the express terms of the contract as appearing in the deed; these terms clearly excluded the right to redeem in the circumstances in which the suit was brought.

Upjohn, K. C., replied

December 9th.—The judgment of their Lordships was delivered by Sir LAWRENCE JENKINS.

These are consolidated appeals preferred by special leave of His Majesty in Council from two decrees, dated the 9th day of February, 1915, and the 19th day of June, 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed two decrees passed by the Subordinate Judge of Kheri on the 7th day of September, 1914, and the 17th day of April, 1916, in suits No. 284 of 1913 and No. 93 of 1915.

The question for determination is whether Muhammad Sher Khan, the mortgagor and appellant in both appeals has a present right on payment of the mortgage money to redeem the mortgaged property. This has been decided adversely to him in both the lower courts.

The mortgage is dated the 9th day of June, 1908, and is Exhibit A 36 on the record. The sum of Rs. 82,000 is recited to be due, and the mortgagor declares—"Therefore I . . . do hereby mortgage for five years" the immovable property there described. Then follow the terms.

Clause 1 provides for the payment of interest half yearly at the rate of 9½ annas per cent. per month, for compound interest, in the event of default, and that—

"This system of payment of interest and of compound interest by six-monthly instalments will continue during the stipulated period as well as after that till redemption and payment of the entire amount."

(1) (1911) 15 C. W. N., 441.

Clause 4 is in these terms :—

"After five years at the end of Jeth 1320 Fasli in the fallow season I shall pay at a time and in a lump sum the entire principal, interest and compound interest and redeem the mortgaged property."

Clause 3 provides :—

"That if interest for four six-months be not paid in full, or if at the stipulated period, i e, after five years, I do not get the mortgaged property redeemed on payment of the entire amount of principal, interest and compound interest, then in both cases the mortgagee will have the option either to take possession of the mortgaged property in lieu of the principal for a period of twelve years commencing from the date of entering into possession or to let his interest and compound interest run as usual, in which case I shall not raise the objection to the effect that the mortgagee did not take possession in order to let his interest accumulate—the mortgagee having the option to choose one of the two alternatives."

Clause 4 deals with mutation of names.

Clause 5 is in these terms :—

"The mortgagee will remain in possession for twelve years from the date on which he takes possession of the mortgaged property and the mortgagor will not have the right of redemption during the period of twelve years."

Clause 6 stipulates for the appropriation of produce and profits in lieu of interest, and that during the period of possession neither the mortgagee will have any claim to interest nor the mortgagor to profits, and there will be no accounting as to shortage or surplusage of profits at the time of redemption.

Clause 9 provides :—

"That on the expiry of twelve years at the end of Jeth, i.e., on Puranmashi in the fallow season I shall redeem the mortgaged property on payment of principal, interest and compound interest, " and other specified payments.

"Pending the payment of the entire demands due hereunder the mortgagee will as usual remain in possession and occupation of the mortgaged property in accordance with the above-mentioned conditions."

Interest fell into arrear, and at the stipulated time the mortgage money was not paid. Thereupon suit No 234 of 1913 was instituted by Raja Seth Swami Dayal, the mortgagee, for possession of the mortgaged property under the terms of the mortgage. He was resisted by the mortgagor, who pleaded that he intended to redeem the property.

On the 7th day of September, 1914, the Subordinate Judge decided in favour of the mortgagee, who obtained possession on the 14th day of February, 1915. An appeal was preferred by the mortgagor to the Court of the Judicial Commissioner of Oudh,

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but it was dismissed on the 19th day of February, 1915, the Court at the same time declaring that the decree would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. On the 25th day of February, 1915, the mortgagor applied for leave to appeal to His Majesty in Council, but his application was dismissed on the 26th day of April, 1915. On the 18th day of June, 1915, the mortgagor instituted suit No 93 of 1915, for redemption. It was dismissed in the first Court on the 17th day of April, 1916, and this was affirmed on the 19th day of June, 1918, by the Appeal Court on the ground that the suit was premature. On the 23rd day of August, 1918, the mortgagor applied to the Court of the Judicial Commissioner for leave to appeal to His Majesty in Council, but without success.

Finally, the mortgagor, on an application here, obtained special leave to appeal from the appellate decrees in both suits on the 30th day of May, 1919.

Many questions were raised in the Courts below which have now disappeared, and all that now remains to be determined is whether the present claim to redeem is premature. Mortgages of immovable property are governed by the provisions contained in Chapter IV of the Transfer of Property Act 1882. In section 58 four kinds of mortgage are described—a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, and an English mortgage. Section 98, headed "Anomalous Mortgages," contemplates a mortgage that does not fall under any of the four descriptions contained in section 58, and is not a combination of a simple and a usufructuary mortgage or of a mortgage by conditional sale and a usufructuary mortgage. In the case of such a mortgage the rights and liabilities of the parties are to be determined by their contract as evidenced in the mortgage-deed and, so far as such contract does not extend, by local usage.

By section 60 of the Act it is provided that at any time after the principal money has become payable the mortgagor has a right to redeem, and a suit to enforce it is called a suit for redemption.

The contest between the parties to this litigation turns upon whether the mortgagor's right to redeem is suspended by the

provision in the mortgage which purports to entitle the mortgagee to remain in possession for twelve years from the date on which he took possession.

In the argument there has been considerable discussion as to the category to which this mortgage belongs, and more especially as to whether or not it is an anomalous mortgage. But their Lordships do not think it necessary to pursue this inquiry, for, in the view they take, the rights and liabilities of the litigants must depend on the terms of the instrument as controlled by the Transfer of Property Act, for, even if it were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by section 60, and the provisions of the one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage-money to redeem

The section is unqualified in its terms, and contains no saving provision, as other sections do, in favour of contracts to the contrary. Their Lordships, therefore, see no sufficient reason for withholding from the words of the section their full force and effect. In this view the mortgagor's right to redeem must be affirmed, and as both suits are now before the Board there will be no difficulty in passing one decree in both so framed as to give due effect to this right.

Though the appellant has succeeded in these appeals, by his procedure and dilatoriness he must be held responsible for this protracted litigation, and the consequent wasted expense; and to mark their disapproval of his conduct their Lordships will not interfere with the orders as to costs made by the lower courts, nor will they allow him any costs of these appeals.

The decrees of the lower Courts should, therefore, be discharged except so far as they order payment of costs by the mortgagor.

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There should then (in their Lordships' opinion) be one preliminary decree for redemption in both suits in accordance with order XXXIV, rule 7, of the Code of Civil Procedure, 1908. But in taking the accounts the period during which the mortgagee may have been in possession under the decree in suit No. 234 of 1913 should be excluded, for, though the provisions of the mortgage entitling the mortgagee to possession cannot operate to defeat section 60 of the Transfer of Property Act, effect should be given to them so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce Mal and Sewai and profits of the mortgaged villages after payment of the Government revenue. And so, during this period, as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest.

The decree should further provide that if payment is not made on the fixed day the mortgaged property should be sold.

Their Lordships will humbly advise His Majesty that the case ought to be remitted to the Court of the Judicial Commissioner of Oudh with directions to pass a decree in accordance with the opinion expressed. There will be no order as to the costs of these appeals.

Appeal allowed and cause remanded.

Solicitors for the appellant :—*Barrow, Rogers and Nevill.*

Solicitors for the respondent :—*T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

BHUP KUNWAR AND ANOTHER (PLAINTIFFS) v. BALBIR SAHAI AND OTHERS (DEFENDANTS).*

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Hindu law—Joint Hindu family—Mortgage by father—After-born son's right to question validity—Suit by a son to set aside mortgage—Right of second son born pending suit to question the validity of the mortgage after death of plaintiff—Antecedent debt—Legal necessity.

The father in a joint Hindu family consisting of himself and one son (a minor) executed a mortgage of some of the joint family property. Shortly after the execution of this mortgage, the son, under the guardianship of his uncle, filed a suit for a declaration that this mortgage was not binding on the joint family property, as it had been made without legal necessity.

* First Appeal No. 348 of 1918, from a decree of Muhammad Ali Ausat, Subordinate Judge of Aligarh, dated the 26th of July, 1918.

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Pending this suit another son was born to the mortgagor. The first son died, and at a later period the representatives of the mortgagee brought a suit against the surviving son and the widow of the mortgagor, for enforcement of their mortgage.

Held that the second son was not debarred from raising as a defence to the suit the same pleas as had been raised by the elder son in the earlier suit. *Kesho Prasad Singh* v. *Shiv Pargash Ojha* (1) and *Venkatanarayana Pillai* v. *Subbammal* (2) distinguished.

Held also, that, part of the consideration for the mortgage being a promissory note executed very shortly before the mortgage by the mortgagor in favour of the mortgagee, it was upon the plaintiffs to show that this debt, although it might be called an antecedent debt, was borrowed for purposes which would be binding on the joint family

THE facts of this case are fully stated in the judgment of the Court.

Dr. *S. M. Sulaiman*, Babu *Saila Nath Mukerji* and Munshi *Beni Bahadur*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ. :—This is an appeal against a decree of the Subordinate Judge of Aligarh in a suit brought by the plaintiffs appellants to enforce a mortgage executed on the 12th day of October, 1904, in favour of one Bishan Singh.

Bishan Singh has died and his property has descended to various members of his family. The first plaintiff, Musammat Bhup Kunwar, is a grand-daughter of Bishan Singh and the second plaintiff, Debi Singh, is Bishan Singh's grandson. It appears that since the death of Bishan Singh his property has been divided among the members of the family under an arbitration award and it was stated in the plaint that a definite share of this mortgage debt had been assigned to the plaintiffs. The defendants second party in the suit are the other members of Bishan Singh's family to whom shares also have been allotted in this particular debt. They were joined as defendants because they had failed to join as plaintiffs.

The contesting defendants in the suit were Balbir Sahai, a minor aged ten years, who is the son of the mortgagor Ganga Sahai, and Musammat Saraswati who is the widow of the mortgagor.

(1) (1921) I. L. R., 44 All., 19. (2) (1915) I. L. R., 38 Mad., 403.

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The amount of the mortgage money was Rs. 4,500 and the claim was for the recovery of a sum of Rs. 9,100 by sale of the mortgaged property. It was stated in paragraph 6 of the plaint that the original mortgage-deed upon which the suit was based was not available and that the suit had, therefore, been brought upon a certified copy of the document.

The minor defendant Balbir Sahai contested the claim on every possible ground. He denied execution of the deed by Ganga Sahai, he claimed that the property was ancestral and joint family property; that Ganga Sahai was a person of licentious habits; that there was no legal necessity for the loan; that in fact consideration had not passed to Ganga Sahai and that, in any case, if it had passed, the debt had been satisfied. There was a further plea to the effect that the transaction was not binding upon this defendant who was not in existence at the time the mortgage-deed was executed. The learned Judge has dismissed the suit. He held in the first place that the suit could not succeed in the absence of the original document of mortgage, the loss of, or failure to produce, which had not been satisfactorily explained. He did not, however, confine his judgment to this point, but dealt with the case on the merits. He held that the property mortgaged was joint ancestral property. He held further that the first defendant was entitled to impeach the deed of mortgage. He further found that the money specified in the deed had actually passed to Ganga Sahai, but he was of opinion that the plaintiffs mortgagees had failed to prove that the debt was a binding debt upon the joint family property. He held, moreover, that it was proved that Ganga Sahai was a person of profligate character and that the debt incurred must be taken to have been incurred for immoral purposes.

The plaintiffs now come on appeal and attack the judgment of the court below in so far as the findings of the learned Subordinate Judge are against them.

We will deal first with the decision of the learned Subordinate Judge on the technical point, namely, the proof of the loss of the document in suit.

It has been mentioned that in paragraph 6 of the plaint the statement made by the plaintiffs was that the original mortgage

deed had been filed in court in connection with some suit in the life-time of Bishan Singh.

The only direct evidence which was produced in order to prove the loss of the document or in order to establish some reason for its not being forthcoming was that of the plaintiff Debi Singh. Debi Singh's evidence, according to the learned Subordinate Judge, was pure hearsay evidence, and he held that such evidence was not admissible for the purpose of proving the loss of the deed so as to justify the admission of secondary evidence in the shape of the certified copy which was produced in court. An examination of Debi Singh's evidence proves that the learned Subordinate Judge is right in his opinion. All that Debi Singh could say was that he heard from Bishan Singh that the latter in connection with some application for execution of a decree had gone to court with the original document of mortgage for the purpose of having a proclamation made, notifying that the property sought to be sold was subject to the mortgage in his favour. On the evidence as it stands we have no doubt that the decision of the Subordinate Judge on this issue is perfectly correct.

We do not, however, propose to deal with this appeal only upon this ground. We have mentioned that the Subordinate Judge went into the merits of the case and we now proceed to deal with his findings on the various issues which affect the merits. First, as to the issue of legal necessity. The certified copy which was produced in evidence in the court below sets out that the mortgage money of Rs. 4,500 was made up of two items, one of Rs. 400 and the other of Rs. 4,100. The sum of Rs. 400 was recited to be due in respect of a note of hand which had been executed by Ganga Sahai in favour of Bishan Singh on the 18th day of September, 1904, that is to say, some 24 days before the mortgage deed was executed. The balance of Rs. 4,100 is stated in the deed to have been advanced to Ganga Sahai for the purpose of starting a cloth business. The finding of the learned Subordinate Judge is that there never was any cloth business in existence. He bases this finding upon certain direct evidence which was produced before him, evidence given by people who were in a position to know whether or not Ganga Sahai did as a matter of fact carry on a

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business of this kind. On the part of the plaintiffs one witness was put forward who tried to make out that Ganga Sahai had been dealing in cloth. The learned Subordinate Judge, for reasons which commend themselves to us, has declared that the evidence of this witness is not reliable. We agree, therefore, with the finding of the court below that it was not proved that Ganga Sahai was carrying on any business as a cloth dealer.

As regards the sum of Rs. 400 due upon the promissory note the learned Judge seems to have held that this debt was tainted with immorality. He took, however, another ground which seems to us to be a very proper one, and that is that the promissory note had been executed in favour, not of any other creditor, but in favour of Bishan Singh the mortgagee himself. He held that in these circumstances it was upon the plaintiffs to show that this debt, although it may be called an antecedent debt, was borrowed for purposes which would be binding on the joint family. No evidence at all was forthcoming in order to prove the nature of the debt which was secured by this promissory note and on that ground we think the Subordinate Judge was entitled to hold that this did not constitute a debt which was binding on the family.

The result, therefore, is that on the findings of the court below with which we are in agreement, the plaintiffs have failed to establish that the debt secured by this deed of mortgage was a debt which was binding on the joint family property or that they made any reasonable inquiries on the point and satisfied themselves that the money was about to be applied for purposes which would be binding.

It was argued in the court below, and it has also been argued here, that the minor defendant Balbir Sahai was not entitled to challenge this deed of mortgage which, as we have mentioned, was executed before he was born. In dealing with this point the learned Subordinate Judge has quoted a passage from Mayne's Hindu Law, 8th Edition, page 460 (paragraph 342). The law on this subject appears to be well settled, and it is correctly laid down in the passage which the learned Subordinate Judge has cited. The relevant passages in paragraph 342 run as follows :—"Therefore a son cannot object to alienations validly

by his father before he was born or begotten, because he only by birth obtain an interest in property which was existing in his ancestor. Hence if at the time of the alienathere had been no one in existence whose assent was ssary or if those who were then in existence had consented, uld not afterwards object on the ground that there was no ssity for the transaction.....On the other hand, if the alienawas made by a father without necessity and without the ent of sons then living, it would not only be invalid against a but also against any son born before they had ratified the saction and no consent given by them after his birth would inding upon him."

It is now to be mentioned that at the time Ganga Sahai cuted this deed there was in existence a minor son of his, ed Raghunath Sahai, who subsequently died. On the 5th of January, 1905, that is to say, less than three months after mortgage-deed was executed, Raghunath Sahai, acting under guardianship of his uncle, brought a suit against his father , mother, who was an attesting witness to the mortgage, ing for a declaration that the document was not binding on joint ancestral family property on the ground that it had n made without any legal necessity. A copy of the plaint in s case is to be found at page 6 of the appellants' book.

The suit was decided by the Subordinate Judge of Aligarh a judgment which is dated the 31st day of July, 1906, and ich is printed at page 8 and the following pages of the pellants' book.

It is an admitted fact that the present minor defendant lbir Sahai, although he was not in existence at the time when is suit was instituted, was born before judgment was delired.

In these circumstances, applying the law as has been laid wn in the passage above, it seems to us to be impossible contend that this minor defendant has no *locus standi* challenge the validity of the mortgage-deed in suit. It is ite clear that at the time the document was executed there as in existence a son of the mortgagor. It is further clear at no question of the consent of this son to the alienation

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can be raised. In the first place, he was a minor, and in the next place we have the fact that a suit was brought on his behalf a few months afterwards for the purpose of contesting the validity of the alienation. It cannot, therefore, be argued, for the reasons just stated, that the defendant Balbir Sahai was not entitled to object in this suit to the validity of the deed in question.

It has, again, been argued that even if this minor defendant is to be allowed to question the validity of this alienation made by his father he is nevertheless bound by the judgment in the earlier suit. The learned counsel for the appellants has relied in this connection upon a Full Bench ruling of this Court in *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (1)

It was held in that case, following a decision of their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (2) that a suit by a reversioner for a declaration that an alienation made by a Hindu widow in possession is without legal necessity and inoperative beyond her life-time, is brought by him not for his personal benefit, but in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate and to remove an apprehended injury to the common interest of all the reversioners. A decree in such a suit is, therefore, binding, if obtained after fair contest and in the absence of fraud and collusion, not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. It was laid down that this is so not because one reversioner in that case must be deemed to claim title through another but because the reversioner who sues represents the others and Explanation VI of section 11 of the Code of Civil Procedure comes into operation. For, the right claimed by the presumptive reversioner who sues is a right to demand that the estate be kept intact and free from danger during its enjoyment by the widow and it is a right claimed in common for himself and all the members of the reversionary body. This view of the law, which must now be accepted, is based upon

(1) (1921) I L. R., 44 All., 19. (2) (1915) I L R., 38 Mad., 406.

the identity of the interest of all the reversioners to an estate which for the time being is in possession of a female heir. But we think it would be difficult to apply these principles to a case like the present.

When Raghunath Sahai brought his suit in the beginning of 1905 there were only two persons interested in this estate, one being Raghunath himself and the other his father, who was impleaded as a defendant. It follows, therefore, that the whole estate as it then stood was represented in the suit.

Balbir Sahai, the present minor defendant, had not then been born. Before the suit was decided Balbir had come into existence and had thus come to have an interest of his own in the estate, an interest which was quite distinct from that of his brother and his father. This being so, we cannot see how at the time the suit came to be decided it can be said that Balbir was represented by his minor brother the plaintiff, whose interest was totally distinct from his own. These being the facts, we hold that it is not possible to argue that the minor defendant Balbir Sahai is bound by the judgment in the previous suit upon any of the principles which have been set out in the Full Bench ruling of this Court to which reference has already been made.

We have now dealt with all the points which have been argued before us. We may mention that it was contended that the general evidence of immorality which was led in the court below would not justify a finding that any particular portion of the money borrowed by Ganga Sahai had been applied for immoral purposes. This argument was put forward in connection with the item of Rs. 400 due on the promissory note. We have discussed this matter above, and so far as that item is concerned, we do not base our judgment upon the evidence relating to immorality; but, as we have said, the learned Subordinate Judge took another ground, and we hold that in the circumstances it was the duty of the plaintiffs to offer some explanation regarding the nature of this debt or the circumstances in which it came to be borrowed, for, as we have pointed out, the promissory note was executed in favour of the mortgagee himself only a few weeks before the mortgage in suit was drawn up.

The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

1921 November, 18.

HUKAM SINGH (DEFENDANT) *v.* BABU LAL AND ANOTHER (PLAINTIFFS).*

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 83 *and* 84—*Full deposit made by mortgagor but refused by mortgagee and subsequently withdrawn by mortgagor—Interest.*

When once the full amount due on a mortgage has been paid into court under the provisions of section 83 of the Transfer of Property Act the running of interest stops, and this is not affected by the withdrawal of the deposit by the mortgagor after refusal of the mortgagee to accept it. *Velayuda Naicker* v. *Hyder Hussan Khan Sahib* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Piari Lal Banerji* and Munshi *Panna Lal*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—The only point raised in this Second Appeal is whether the mortgagee is entitled to interest at the stipulated rate up to the date of suit, or whether, a deposit having been made in court in accordance with section 83 of the Transfer of Property Act, interest ceased from that date. The mortgage in suit was executed on the 21st day of August, 1906, for a sum of Rs. 500 and it was agreed that compound interest should be paid at Re. 1-8-0 per cent. per mensem with yearly rests. On the 31st day of October, 1909, a sum of money was deposited in court by the mortgagor under section 83 of the Transfer of Property Act. Notice was served on the mortgagee and he appeared in court and refused to accept the amount deposited. Some six months afterwards the mortgagor withdrew the amount which he had deposited in court. This suit was brought on the 12th day of August, 1918, claiming payment for the principal and interest at the stipulated rate up to the date of suit. The main defence was that the whole amount of the mortgage had been deposited in court under section 83 of the Transfer of Property Act and that from that date interest ceased to run on the mortgage. The Subordinate Judge found,

* Second Appeal No. 1041 of 1919, from a decree of Jagat Narain, District Judge of Aligarh, dated the 8th of May, 1919, modifying a decree of Muhammad Ali Ansar, Subordinate Judge of Aligarh, dated the 27th of February, 1919.

(1) (1909) I. L. R., 33 Mad., 100

as a matter of fact, that the amount deposited represented the whole amount due on the mortgage up to that date. He, however, thought that the withdrawal of the money subsequently by the mortgagor did not prevent interest from running. He, however, held, for reasons which we need not consider, that the proper interest which should be allowed subsequently to that date was 12 annas per cent. per mensem. Both the parties appealed to the District Judge and he came to the conclusion that the deposit made by the mortgagor represented the whole amount then due under the mortgage. But he held that inasmuch as the money had been subsequently withdrawn, interest did not cease to run and he relied on *Krishnasami Chettiar* v. *Thippa Ramasami Chettiar* (1) and also *Thevaraya Reddy* v. *Venkatachalam Pandithan* (2). He, therefore, allowed the appeal of the plaintiff mortgagee and dismissed the appeal of the defendant mortgagor. Hence two appeals have been filed in this Court on behalf of the mortgagor.

It seems to be settled law in England that in order to prevent interest running, the tender or deposit must have been made so as to be always available to the mortgagee and, following that rule, the Calcutta High Court has held that subsequent withdrawal of money from court will not prevent the running of interest. The rule in England seems to be based on principles of equity. In India we have to interpret section 83 of the Transfer of Property Act. The late Sir Rashbehari Ghose in his "Law of Mortgage in India", 4th Edition, Volume 1, page 236, seems to be of opinion that the English rule was of doubtful application in India. Section 84, so far as is necessary for this case, runs as follows:—"When the mortgagor has deposited in the court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor has done all that has to be done to enable the mortgagee to take such amount out of court." It has been found in this case that the mortgagor deposited in court on the 31st day of October, 1901, the full amount then due on the mortgage. It has further been found that the mortgagor had the proper notice issued to the mortgagee under section 83 of the Act and that the

(1) (1910) I. L. R., 35 Mad., 44. (2) (1916) I. L. R., 40 Mad., 804.

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mortgagee appeared in court and definitely refused to accept the money. It seems to us that the mortgagor had done all that he was required to do under section 84 of the Act. In the Madras High Court in *Velayuda Naicker* v. *Hyder Hussan Khan Sahib* (1), this view was accepted. In *Krishnasami Chettiar* v. *Thippa Ramasami Chettiar* (2), it was held that on the withdrawal by the mortgagor on the mortgagee's refusal to accept the amount deposited in court, interest does not cease to run. Both these cases were considered in the later case in *Thevaraya Reddy* v. *Venkatachalam Pandithan* (3), the facts of which, however, are distinguishable from those of the present case. In the course of their judgments one learned Judge was of opinion that the case in I. L. R. 35 Madras, had been properly decided. On the other hand, Mr. Justice PHILLIPS thought that the earlier ruling in I. L. R., 33 Madras, was correct. For the reasons given by Mr. Justice PHILLIPS on page 808 we think that the decision of the learned District Judge in this case was wrong. We, therefore, decree the appeal with costs and modify the decree of the court below by directing that the amount payable by the mortgagor is only Rs. 787, and the usual decree giving six months for payment will be prepared.

Appeal allowed.

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November, 18.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

KAMAL NATH AND OTHERS (DEFENDANTS) v. BITHAL DAS AND OTHERS (PLAINTIFFS)*.

Civil Procedure Code (1908), *section* 110—*Appeal to His Majesty in Council*—"*Affirms the decision*," *meaning of*—*Decree of lower court modified only in favour of the would-be appellant, but in other respects affirmed*

Held that an appeal to His Majesty in Council would not lie against a decree which, in so far as it modified the decree of the court below, was in favour of the would-be appellant, but, in so far as it was against the would-be appellant, agreed with the decree of the court below. *Bhagwan Singh* v *The Allahabad Bank, Ltd.*, (4) distinguished.

THIS was an application for leave to appeal to His Majesty in Council. The facts of the case, so far as they are necessary for the purposes of this report, appear from the order of the Court.

* Application No 31 of 1921, for leave to appeal to His Majesty in Council.

(1) (1909) I. L. R., 33 Mad., 100.
(2) (1910) I. L. R., 35 Mad., 44.
(3) (1916) I. L. R., 40 Mad., 804
(4) (1920) 19 A. L. J., 8.

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Munshi *Harnandan Prasad*, for the appellants.

Babu *Lalit Mohan Banerji*, for the respondents.

MEARS, C. J., and BANERJI, J.:—This is an application for leave to appeal to His Majesty in Council. The plaintiff in the suit claimed a large sum, exceeding Rs. 10,000, on the basis of a mortgage. This mortgage was denied by the defendant, the present applicant. The court of first instance decided against him and decreed the claim in full. He appealed to this Court and this Court affirmed the decision of the court below upon the question of the fact and the validity of the mortgage. This Court, however, reduced the rate of interest awarded against the appellant by the court of first instance. The result was that this Court modified the decree of the court of first instance to the extent of about Rs. 300. But that modification, so far from being prejudicial to the interest of the present applicant, was in his favour. On the ground of this modification he seeks to appeal to His Majesty in Council on the question of the genuineness of the mortgage and it is contended on his behalf that as this Court did not affirm the decree of the court below, he is entitled, as of right under section 110 of the Code of Civil Procedure, to appeal to His Majesty. We do not think that this contention is valid. So far as the question of the mortgage is concerned, the decision of the lower court was affirmed by this Court and there were concurrent findings of fact, against which there could be no appeal to His Majesty in Council. The modification of the decree was a modification in favour of the applicant, and as to this he certainly does not seek to appeal nor could he appeal. Therefore his application for leave to appeal relates in fact to the portion of the decree which was prejudicial to him but which was a decree affirming the decision of the court below and not modifying it. We have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council. In the present case the subject-matter of appeal to His Majesty in Council is, as pointed out above, that portion of the decree in respect of which the decree of this Court was a decree in affirmance of the decree of the court below and not in modification of that decree. Therefore in our opinion this is not a case in which the applicant is entitled as of right

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to appeal to His Majesty in Council. This case is distinguishable from the case of *Bhagwan Singh* v. *The Allahabad Bank, Ltd.* (1). There the decree was modified to the prejudice of the applicant and on that ground it was held that he was entitled to appeal to His Majesty in Council. In this view the present application must fail. We accordingly reject it with costs.

Application rejected.

Before Mr. Justice Walsh and Mr. Justice Stuart.

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THE MUNICIPAL BOARD OF AGRA (DEFENDANT) v. ASHARFI LAL, (PLAINTIFF) AND SURAJ BHAN AND OTHERS (DEFENDANTS) *

Municipal Board—Action against Board on account of misdescription of plaintiff in the roll of candidates, whereby he lost his right to offer himself for election—Liability of Board—Principal and agent—Discovery of documents—Civil Procedure Code (1908), *order XI, rule* 12.

If any duly qualified citizen, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote and so as to give the returning officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful, he has suffered a legal wrong; he has been deprived of a right recognized by law, and he has against the person so depriving him a remedy by what has always been called "an action on the case" for nominal damages for the right that he has lost, which may, at the discretion of the court, be punitive or exemplary, if the conduct is the result of some malicious and wicked intention; and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example, efforts to replace his name on the roll.

Where such an action is brought against a Municipal Board, the complaint being that the list of candidates had been so tampered with as to deprive the plaintiff of his right to offer himself as a candidate, the question of the corporate liability of the Board and the individual liability of its officers or servants must be determined according to the general law of principal and agent.

In a case where the plaintiff is of necessity dependent for proof of his allegations upon documents in the possession of the defendant, of the precise nature of which he cannot be aware, the plaintiff's proper course is to apply to the court for an order under order XI, rule 12, of the Code of Civil Procedure.

THE facts of this case are fully stated in the judgment of WALSH, J.

* First Appeal No 47 of 1921, from an order of Joti Sarup, Additional Subordinate Judge of Agra, dated the 17th of December, 1920.

(1) (1920) 19 A. L. J., 8.

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Pandit *Uma Shankar Bajpai*, for the appellant.

Mr. *Nihal Chand*, Mr. *Abu Ali* and Munshi *Narain Prasad Asthana*, for the respondents.

WALSH, J.:—This is an appeal from an order of remand which was clearly rightly made, although, we think, made on wrong grounds. The matter raises a question of such importance, possibly to the plaintiff himself but certainly to the general public, that it is desirable to make the law clear. It has not yet been tried and we refrain from expressing any opinion about the merits. We would merely say this by way of preface that, in our opinion, the law in India upon the questions raised is the same as the law in England, and the Common Law of England provides that if any duly qualified citizen, or burgher, or person entitled to be upon the electoral roll of any constituency is omitted from such roll so as to be deprived of his right to vote, and so as to give the returning officer an adequate ground for refusing him the right to vote on election day when the matter has to be decided summarily, and that refusal or omission from the roll, as the case may be, turns out on investigation to be wrongful, he has suffered a legal wrong; he has been deprived of a right recognized by law and he has against the person so depriving him a remedy by what has always been called "an action on the case" for nominal damages for the right that he has lost, which may at the discretion of the court be punitive or exemplary if the conduct is the result of some malicious and wicked intention; and also for any pecuniary expenses to which he may have been reasonably put as a result of the wrong done, for example, efforts to replace his name on the roll. It has been suggested by the Municipal Board before us that the plaintiff either did not seriously assert, or abandoned, this precise form of claim when he came to court. It is certainly contained in his plaint. It does appear to be absent from the judgments of the two courts as a substantive matter in dispute, and it is not the ground on which the lower appellate court has remanded the suit. But we are not satisfied that the plaintiff ever intended to abandon it, and it is clearly a matter which ought to be disposed of either by a correct judicial decision or by the consent of the parties. All that we know about the plaintiff's attitude

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in the matter is that he asked for something very much more,—one relief which he had already got, and another, namely, a declaration that the constitution of the Municipal Board was altogether invalid, which he was never likely to get,—and that he announced his intention of conferring such damages as he could recover upon some charitable institution.

In order that our view may be properly appreciated the allegation of the plaintiff should be stated. The suit is brought against the Municipal Board of Agra. The plaintiff, who is a pleader, is a previous member of the Board, on which he says he sat from 1914 to 1916. Two lists are prepared by the officials of the Board under statutory authority, namely, an electoral roll and a candidates' list. An election was approaching in the year 1919, and the plaintiff had been a severe critic of the Municipal administration up to that time He alleges, and on this matter he is the best judge, that his criticism was such as to create hostility to himself personally among the members of the Board He is a houseowner and an occupier at Agra and it is not denied that he is entitled to be on both the roll and the candidates' list; indeed he was on both, and the revising authority, consisting of three members of the Board, passed the roll and the list on the 31st day of January, 1919. Either as the result of what these persons did officially in the course of their business, or wrongly with intention in the course of their business, or as a result of the revengeful and malicious interference of some individual, either a member of the Board or an employé in the office of the Board, after the statutory sitting of the revising authority the plaintiff's name on the list was so put and his description so fabricated as to represent him to be somebody other than the person he was known to be. For example, on the candidates' list (and if his description of himself is correct, it is as a candidate that he was most objectionable to the Board) he is described by his right name but with his wrong father, his wrong caste, and his wrong occupation, all three of which put against his name were those of the owner of the house and not of himself. This being so, the Nomination Officers who acted sometime between the 31st day of January and the 8th day of March had to reject his nomination, because the person who presented himself

at the nomination was not the son of the father in the candidates' list. Thereupon the plaintiff brought this suit asking for the correction of the list as a specific relief, claiming damages for the wrong done to him, and at some later stage of the suit adding the somewhat childish claim that because the electoral list or the candidates' list had been tampered with, the whole constitution of the Board was invalid. Before the case came on for trial the District Magistrate had corrected the list. This indeed happened before the election took place and it is said that the plaintiff was an unsuccessful candidate. That is in no way a defence to the suit. We know nothing about the merits of municipal controversies at Agra, but it might happen that a candidate whose nomination had been rejected and whose qualifications had obviously become a matter of public discussion would be seriously hampered in his efforts to obtain votes, and, even although he succeeded in correcting the mistake and securing his proper nomination before the election, it might be sufficient in certain cases to explain his defeat. But apart from that, in the leading case on the subject, namely *Ashby* and *White*, which was decided in the reign of Queen Anne in England, the plaintiff in that case, who had been deprived of his right to vote, intended to vote for the successful candidate; none the less he had been deprived of a lawful right for which he was held entitled to recover damages. Unfortunately the defendants have done, up to this moment, little or nothing to clear the ground and to enable the courts to see whether or not the plaintiff's grievance is well-founded. What the defence may ultimately be nobody knows, because the door has been closed upon the plaintiff before that stage was reached. It is impossible to discover it from the pleadings, and one is bound to observe that one's suspicions are invariably aroused against defendants who shelter themselves behind pleas which disclose nothing on the facts or merits of the case. The defendants who have been sued and presumably rightly sued, because the plaintiff cannot know—no member of the public can know—what goes on behind the doors of the municipal body, are the Municipal Board itself and individual members, including the Executive officer. If liability is eventually established for damages, that

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liability, in order to be placed upon the right shoulders, must be decided according to the ordinary general principles of principal and agent. No individual member of the Board can be made liable in his own pocket, separately and independently of the Board, for an act in which he had no part or lot himself and which he did not in any way authorize. On the other hand, any individual member of the Board who either expressly or indirectly encouraged, incited, directed, or approved of, in other words, aided and abetted the attempt which was undoubtedly made by somebody to deprive the plaintiff of his right to be on the candidates' list would be liable in his own pocket, independently altogether of the question whether or not the Municipal Board would be liable as well. The Municipal Board as principal would only be liable for the act, i.e., the public funds of which the municipality are custodians and out of which they will have to pay any damages for any corporate act committed by them would only be liable for an act done by themselves informally, or formally by way of resolution, or by a committee of authority like the revising authority appointed by them, or by one of their servants doing what he did, although wrongfully, at a time and in a manner when and in which he is employed to do it by the municipality, if he did it improperly, i.e., if the act were done by a clerk whose duty it was to fill in the plaintiff's name correctly and he filled it incorrectly in the ordinary course of business, the municipality would be responsible for that.

It is perhaps desirable to say quite clearly, although it appears from what we have said already, that the ground on which the case was remanded, namely, the reconsideration of the issue as to whether the Board should be declared to be altogether invalid and improperly constituted because one of the names on its election list is wrongly entered, is one which no court ought to have entertained at all and which the lower court should disregard and strike out of the issues altogether. In its place an issue must be put which we ourselves frame:—"What damages, if any, ought the plaintiff to recover, and from whom, in respect of the wrongful omission to record his name correctly on the candidates' list."

This leads us to some further observations and further directions which, we think, under the special circumstances of this case and of its public importance, we ought to make. In a case of this kind, as one of us had occasion to remark the other day, in cases of an agent suing a principal who has all the figures in his possession, or a partner suing a firm which has all the accounts and books in its possession, a plaintiff is absolutely at the mercy of the defendant who knows the facts unless he takes the steps which the law has provided, and unless the court aids him in taking those steps, to discover the relevant documents which are in the possession of the defendant. So far as we know there is really no power, except in a suit, unless it be the power under the Criminal Procedure Code by means of a search warrant, by which any member of the public can get at documents relevant to the injury which he has suffered, if the public body which has the custody of these documents chooses to sit on them. The plaintiff in this case quite clearly, whatever else may be said about his motives, realizing the difficulty, stated in his plaint that he did not know who was the author of his grievance but that it was impossible to resist the conclusion that his name was intentionally removed from the list. He has a right, and any court trying such a suit has the duty, to insist that all documents in existence or which had been in existence which throw light on that question must be produced. The plaintiff made an effort to obtain discovery by the rather feeble machinery of a notice to produce, the only effect of which is, if the other side refuses to produce, to entitle you to prove your own copy, and as you have never seen the original it is not a very valuable right. That distinction is often lost sight of. A notice to produce is not a subpœna nor is it any part of the machinery for discovery. It merely gives you the right, if it is ignored, to prove any copy in your possession. Discovery is the machinery by which you discover what documents are in existence which are not in your possession. The defendants, not unnaturally, met the plaintiff half way, saying, no doubt correctly, that there were too many papers to file at that stage and that some might be lost, but they undertook to produce them at the proper time. It does not surprise us that the proper time never arose.

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It seldom does when vague promises of that kind are made. But under order XI, rule 12, any party, like the plaintiff in this case, may without filing an affidavit apply to the court for an order directing the other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. We think that in a case of this kind the plaintiff ought to have discovery, and it is not too late, and we direct the lower court before hearing this suit again on the merits to make an order under that rule if the plaintiff makes a proper application, and not to reject it on the ground that it has been made too late. It is necessary in the case of a public body to explain how the rule should be worked. In the first place the contention already made by the Board's counsel that there are too many papers is based upon a misunderstanding. It is not necessary to produce all the papers in the possession of the municipality, relating to the electoral roll and the candidates' list, of any kind whatever. All that is required is to produce for inspection the documents relating to the entry of the plaintiff's name on the candidates' list and the electoral roll and every document, through whatever stage it has passed, relating to the plaintiff's name, whether there has been any alteration, addition, or subtraction from the original entry in such rolls of the plaintiff's name, and any correspondence between the members of the Board and the Executive Officer or Secretary or other official or clerk of the Board relating to the plaintiff's name and the corrections or alterations made on the list relating to the plaintiff. It is not necessary to flood the court. It would be a breach of duty if the Executive Officer or the Secretary attempted to flood the court with a number of irrelevant documents. If anything has been destroyed or weeded out it must be included by description in the affidavit in the class of documents which have been in the possession of the municipality. There must be no attempt to burke that clause, which has been put in the rule for good reason. If a document has been in their possession, and is not now, its disappearance must be explained by an officer of the Board who knows what has become of it and why and when it was destroyed or removed. Lastly, following the ordinary practice

in England with reference to a Municipal Corporation or limited company, the affidavit must be made on behalf of the Municipal Board by the Chairman or the Executive Officer, who making their affidavits jointly as such officers must swear that they have made all necessary inquiries of all employés in the Board with reference to the documents which they swear to in their affidavit, and if there is any document to which they make any objection, legally or otherwise, to produce, although it is relevant to this question, they must take their objection in the affidavit and the court must decide it before hearing the case.

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The appeal must be dismissed with costs.

STUART, J.—I concur in the order proposed.

Appeal dismissed.

Before Mr. Justice Piggott and Mr Justice Walsh.

SHIB KUMAR AND OTHERS (APPLICANTS) *v.* SHEO GHULAM AND OTHERS (OPPOSITE PARTIES).*

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Civil Procedure Code (1908), *order XLIII, rule* 1—*Appealable order—Appeal as to costs only, when the substantive order is in favour of the appellant.*

If an order is itself appealable, an appeal will lie from that part of the order which relates to costs, although the substantive order may be in favour of the appellant. *Balkissen Dass* v *Lvckmesgut Singh* (1), *Moshungan* v. *Mozari Sajjad* (2) and *Vasudeva Ramchandra* v. *Bhavan Jivraj* (3) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narain Prasad Ashthana*, for the appellants.

Dr. *M. L. Agarwala*, for the respondents.

PIGGOTT and WALSH, JJ.:—This first appeal from order comes before us under the following circumstances. On objection taken by the judgment-debtors a certain sale was set aside. The court, however, for reasons given, saw fit to order that the judgment-debtors should not merely bear their own costs of that objection but should also pay the costs of the other side. The judgment-debtors have submitted to the order in so far as it directed them to bear their own costs of the proceeding. They have no quarrel with the order directing the sale to be set aside, which was indeed passed at their instance. They appeal against

* First Appeal No. 91 of 1921, from an order of Ladli Prasad, Subordinate Judge of Shahjahanpur, dated the 11th of April, 1921.

(1) (1881) I. L. R., 8 Calc., 91. (2) (1885) I. L. R., 12 Calc., 271.

(3) (1891) I. L. R., 16 Bom., 241.

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that part of the order which directed them to pay the costs of the other side. An objection is taken that no appeal lies. In *Balkissen Dass* v. *Luchmeeput Singh* (1) the principle was broadly laid down that, if an order is itself appealable, an appeal will lie from that part of the order which relates to costs. This decision has been followed in *Moshingan* v. *Mozari Sajjad*, (2) and the Bombay High Court has expressed the same opinion in the case of *Vasudeva Ramchandra* v. *Bhavan Jivraj* (3). The words of order XLIII, rule 1 (*j*), give an appeal "from" an order setting aside a sale. This may fairly be interpreted as meaning that, where an order has been passed setting aside a sale, any party to the proceeding dissatisfied with any portion of the order passed has the right of appeal. This seems to have been the view taken by the Bombay and by the Calcutta High Courts, and we are prepared to agree. On the merits it seems to us that the order of the court below, saddling the appellants with the costs of the opposite party, proceeds upon no principle and is one which could have been challenged, even in a second appeal, as being erroneous in law. The court was dissatisfied with the manner in which the judgment-debtors had conducted themselves throughout the whole execution proceedings; but in the particular matter upon which it was adjudicating, and in connection with which it passed the order now under appeal, it held that the objections taken by the judgment-debtors to the sale were well-founded and must prevail. If so, the judgment-debtors were justified in objecting to that sale and no valid reason can be given for requiring them to pay the costs of the other side. They were made to bear their own costs because they had produced certain evidence which the court below treated as both unnecessary and unreliable; but they have submitted to that portion of the order against them and it is not in question here. We think this appeal must prevail, and we allow it accordingly, by setting aside so much of the order under appeal as directed that the objector should bear the costs of the opposite party. The appellants are entitled to their costs of this appeal, and we order accordingly.

Appeal allowed.

(1) (1881) I. L. R., 8 Calc., 91 (2) (1885) I. L. R., 12 Calc., 271.
(3) (1891) I. L. R., 16 Bom., 241.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAIKALI AND ANOTHER (DEFENDANTS) *v.* GOPI NATH NAIK (PLAINTIFF).* 1921 *November*, 25.

Civil Procedure Code (1908), *section* 24; *order XLI, rule* 23—*Remand*—*Transfer of case remanded by High Court*—*Jurisdiction.*

Held that an order of the High Court remanding a case to a District Judge for disposal on the merits will not have the effect of limiting the powers of the District Judge under section 24 of the Code of Civil Procedure unless the Court's order is drawn up in express terms so as to disclose a clear intention of limiting those powers *Sita Ram v. Nauni Dulaiya* (1) not followed. *Pandohi v. Sheo Bharose* (2) referred to

THE facts of this case are fully set forth in the judgment of PIGGOTT, J.

Munshi *Shiva Prasad Sinha*, for the appellants.

Mr. *Sankar Saran*, for the respondent.

PIGGOTT, J. :—This appeal comes before us under curious and somewhat complicated circumstances. There was a suit instituted in the court of the Subordinate Judge of Gorakhpur upon a hypothecation bond. The plaintiff filed a copy of the bond and pleaded loss of the original. The trial court held that the plaintiff had failed to prove by credible evidence the loss of the original, that the suit was not maintainable upon the copy and dismissed it accordingly. There was an appeal to the District Judge of Gorakhpur and this appeal was heard by Mr. R. L. Yorke who then held the office of the District Judge. The effect of his order was to set aside the finding of the trial court, although he did not in terms reverse it. The operative portion of his order was that he remanded the suit to the first court to be tried out on the merits. This order was dated the 4th day of September, 1919, and against it there was an appeal to this Court. In the meantime, however, the trial court was proceeding with the suit, and, on the 19th day of December, 1919, it passed a decree in favour of the plaintiff in the usual form. This Court's order on appeal was passed on the 21st day of May, 1920. For reasons given in the judgment, a Bench of this Court allowed the appeal, set aside the order of the Judge of Gorakhpur and directed as follows :—"That the appeal be and it hereby is returned to the court of the said Judge to be re-admitted on

* First Appeal No. 118 of 1921, from an order of R. L. Yorke, Additional Judge of Gorakhpur, dated the 21st of March, 1921.

(1) (1899) I. L. R., 21 All., 380. (2) (1914) 12 A. L. J., 1094.

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the file of pending appeals and disposed of according to law." When this order reached the Gorakhpur district the office of District Judge was filled by Mr. Moir, and Mr. Yorke was holding, in the same judgeship, the office of Additional Judge. Mr. Moir, no doubt believing that this Court desired and intended that the appeal should return, if possible, to the same officer who had passed the order of the 4th day of September, 1919, availed himself of his powers of transfer under section 24 of the Code of Civil Procedure (Act V of 1908) to send the appeal to Mr. Yorke for disposal. The parties were represented by counsel before Mr. Yorke and although counsel for the defendants seems in the first instance to have stated that he had no instructions, the question in issue was argued before him. Mr. Yorke then recorded a definite finding to the effect that the loss of the original document was proved and that the plaintiff was entitled to maintain his suit upon a copy. He felt himself apparently in a difficulty as to the proper orders to pass in consequence of this finding, because it seemed useless to re-affirm his original order of remand when this had in the meantime been carried out by the trial court and had eventuated in the decree of 19th day of December, 1919. It may be also that he relied upon a passage in the judgment of this Court in which it was said that if the District Judge on further consideration found that the loss of the original document was satisfactorily proved then "an order of remand was correct." It seems useless to speculate as to what the learned Additional Judge would have done if his attention had been called to a ruling of the Full Bench of this Court in *Uman Kunwari* v. *Jarbandhan* (1), but he contented himself with passing an order which, as it stands, declares a certain sum of money to be due to the plaintiff as a mortgage charge upon certain property, but contains no specific directions fixing any date for the payment of the sum, or laying down the consequences that are to follow upon default of such payment. The District Judge probably believed that a final decree for sale would eventually follow, not upon this decree of his, but upon the trial court's decree of 19th day of December, 1919. It seems to me, however, that we cannot possibly anticipate what complications may arise, or what

(1) (1908) I. L. R., 30 All., 479.

difficulties the plaintiff may encounter upon making application for a decree absolute for sale. We have to deal with the appeal before us, which is an appeal by the defendants against the order of the Additional Judge, dated the 21st day of March, 1921, the effect of which has been stated above.

A preliminary objection has been taken to the effect that this order as it stands is not an appealable order at all. Technically I am of opinion that this objection is well-founded; although, if this were the only point to be taken against the appellants, I should have been quite prepared to consider the advisability of allowing them to make such amendments, and to take such other necessary steps, as would convert the appeal before us into a second appeal from a decree. Taking this view of the matter, we have actually heard the appellants on the points taken in their memorandum of appeal. They are clearly not entitled to attack the finding of fact arrived at by the Additional District Judge upon evidence duly considered by him. The one point argued on their behalf has been that, inasmuch as this Court's order of 21st day of May, 1920, directed a remand of the appeal to the court of the Judge of Gorakhpur (obviously meaning thereby the District Judge), that court had no authority to transfer the appeal to the Additional District Judge for disposal and the subsequent proceedings in the court of the Additional District Judge, up to and including the order under appeal, were without jurisdiction. There is some authority for this contention in the case of *Sita Ram* v. *Nauni Dulaiya* (1). Authority to the contrary has been quoted in some cases decided by the Calcutta High Court, but I think it quite sufficient to point out that this very point was considered by a single Judge of this Court in *Pandohi* v. *Sheo Bharose* (2). The learned Judge pointed out that there had been a change in the law in consequence of the redrafting of the present section 24 of the Code of Civil Procedure, corresponding with section 25 of the former Code of 1882. He held that the older decisions based upon the Code of 1882 were no longer applicable and gave strong reasons for his opinion that, in a case like the present, any order of remand passed by this Court would have no effect to limit the powers of the District Judge

(1) (1899) I.L.R., 21 All., 230. (2) (1914) 12 A. L. J. 1094.

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under section 24 of the Code of Civil Procedure, unless this Court's order were drawn up in express terms so as to disclose a clear intention of limiting those powers. In the present instance the reverse is the case. The operative portion of this Court's order merely directed the District Judge to dispose of the appeal according to law. One of the ways in which a District Judge can dispose of an appeal according to law is to transfer it to the court of an Additional Judge of his judgeship for disposal. I have no doubt whatever, speaking as one of the Bench which passed this Court's order of 21st day of May, 1920, that if the whole position had been laid before us we should have said that it was better, unless the parties could show cause to the contrary, that the appeal should go back to the particular officer, i.e., Mr. Yorke, who had passed the order of the 4th day of September, 1919. At any rate I am satisfied that there is no force in the contention that the order now under appeal before us is one wholly without jurisdiction and liable to be set aside on that account. This finding is sufficient to dispose of the appeal before us and I would dismiss it with costs.

WALSH, J. :—I entirely agree that the appeal fails. It seems to me that the points raised are unsubstantial and that in any event the appellant is debarred by having appeared and taken an order from Mr. Yorke at the second hearing without raising any objection.

As to the existing legal position of the parties it seems to me that there may be ground for future technical controversy and I, therefore, desire, with a view to assisting the parties, if possible, to express my opinion about it for what it is worth. If chronology alone is regarded, it might be argued that the decree passed by the first court in the suit on the merits dated the 19th day of December, 1919, was void and of no effect because the order of the 4th day of September, 1919, which gave rise to it had been interfered with by the High Court in March, 1920, and I can understand the ingenious suggestion that if the foundation is gone the fabric which rests upon it must be taken to have disappeared also. In my humble judgment that would be a fallacy in this case. I have looked at the passages relied on in the judgment of the

Full Bench delivered by Mr. Justice BANERJI in *Uman Kunwari* v. *Jarbandhan*, (1) particularly at page 483 to which I will refer in a moment, and I have come to the conclusion that they are mere *dicta* which were not necessary for the decision of the case. To my mind they go a great deal too far. The only point which the Full Bench had to decide was whether an appeal lay at all and if so, whether it ought to succeed. In this particular case the remand order when interfered with by the decree of this Court was not necessarily erroneous and has never been declared to be bad. It was merely declared by this Court to be premature. One is always entitled to look at the reasons in a judgment for an order or decree which is passed, otherwise law reporting would be a superfluity. The remand order was set aside provisionally. The decree of this Court was absolute in terms, but it invited the Judge below to re-consider the matter, and it was distinctly held by the judgment, as my brother has pointed out, that if the Judge found the loss of the original bond proved an order of remand was correct. The learned Judge found on reconsideration, which he had considered unnecessary in the first instance, that the loss was proved, and therefore his remand order became in the events which happened perfectly right. The present order is to my mind a mere interim order completing that which the High Court had directed him to complete, namely his decision upon the preliminary point. It is not a decision on the merits, and in my opinion the plaintiff would be wrong to treat it as a decree in his suit. A decree has been passed in the suit by the first court. At the time the trial was held and that decree was passed it was a perfectly lawful proceeding. More than that, it was conducted in obedience of the order of the lower court remanding the suit to the first court for trial. In the authority to which I have just referred it is said that the "jurisdiction to hear the suit a second time is derived solely from the order of remand. If that order is erroneous and is set aside everything done in pursuance of the order must fall to the ground and be of no effect." Again, it is said, if the remand order were wrongly made the decree and indeed all the proceedings taken under the remand order are null and void. I think those statements are

(1) (1908) I. L. R., 30 All., 479.

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RAJKALI v. GOPI NATH NAIK.

much too sweeping. It depends on the circumstances in each case and on the nature of the invalidity of the remand order. If the remand order is finally set aside and is such an order as ought not to have been passed at all in any case, it may be that the proceedings in the court below fall with it. But in this case, and it must have happened in many other cases, the proceedings taken in the first court as a result of the remand order against which there is an appeal must be and ought to be held to be *de bene esse*. The subsequent event in this case resulted in the remand order being shown to have been quite right. It seems to me that it would be turning the law into absurdity, and would amount to a denial of justice if a proper trial which has taken place under a remand order made by the appellate court and in obedience to such remand order, were held to be invalid when as the result of the High Court's own decision that remand order turned out to have been perfectly justified.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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November, 25.

RAM DHAN AND OTHERS (APPLICANTS) *v.* PRAG NARAIN AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (Act V of 1908), order XLV, rule 7—Act No. XXVI of 1920, section 3 (1)—Extension of time for furnishing security and making deposit—Power of High Court to grant extension limited to sixty days.

Held, on a construction of section 3 (1) of Act No. XXVI of 1920, that the Court has no power to extend the time for furnishing security and making a deposit for translation and printing by a longer period than sixty days

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Nihal Chand*, for the applicants.

Mr. *B. E O'Conor* and Munshi *Girdhari Lal Agarwala*, for the opposite parties.

MEARS, C. J., and BANERJI, J.:—This is an application by the appellants, who ask the Court to extend the time for furnishing security and making a deposit for translation and printing and other charges. The rule which prescribes the time within which an appellant should furnish security for the costs of the respondent and deposit the amount required to defray the expenses of

* Application No 24 of 1921 under order XLV, rule 5, clause (*c*), as amended by Act XXVI of 1920

translation and printing and other charges was, until Act No. XXVI of 1920, in these terms:—"Where a certificate is granted the applicant shall within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date, furnish security etc." By section 3 (1) of Act XXVI of 1920 the words "six months" have been cut down and in their place the following words are to be read "90 days or such further period not exceeding 60 days as the Court may, upon cause shown, allow." As the appellant in this case is appealing against a decree of the 2nd day of March, 1921, he having on the 30th day of July, 1921, obtained a certificate, he is admittedly on any reckoning outside and beyond both periods of 90 days from the date of the decree and six weeks from the date of the granting of the certificate. He is indeed also out of time as regards the longer possible period of 90 days plus 60 days. Therefore the dates we have given show that on the facts of this case the question before us is whether as the law now stands we have got power to extend the time beyond the periods which are mentioned in the amendment. It is conceded in argument that the object of the amendment of 1920 is to try to effect a speeding up in appeals which proceed from this country to the Privy Council, and we think that is a matter which must be borne in mind by us in construing this section as amended. Under the old section to be found in order XLV, rule 7, of the Code of Civil Procedure of 1908 the courts had decided that the periods mentioned in rule 1 were directory only, and that though they were normally the proper periods which should be observed by appellants, they could nevertheless be extended in the discretion of the Court if there were circumstances which the Court thought weighty enough to make it proper for the period to be extended. There is no doubt that it was the uniform practice to extend the time upon cause shown. The question before us is whether having regard to the very careful drafting of the amendment the discretion of the Court is not curtailed and limited, as regards the period from the date of the decree, to an extension of 60 days, beyond which under no circumstances the Court can go. We are of opinion that that is the real meaning and the intended

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effect of the section. It will be seen that the period of six weeks from the grant of the certificate has not got coupled with it any discretionary period In practice an appellant secures not much less than 150 days from the decree appealed against under this provision. Our view is that we have no power to extend the period beyond those times which are now definitely and clearly set out in the amended order XLV, rule 7. To decide otherwise and grant extension beyond the period of six weeks would in our view defeat the object and intention of the amendment. The application is therefore rejected and the certificate revoked.

Application rejected.

FULL BENCH.

Before Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Gokul Prasad.

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November, 30.

SOHAN PAL, MUNNA LAL (PLAINTIFFS) *v.* THE EAST INDIAN RAILWAY COMPANY (DEFENDANT)*

Act No. IX of 1890 (*Indian Railways Act*), *sections* 47, 54 *and* 72—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 149—*Liability of Railway Company for goods accepted by a servant of the Company for conveyance—Grant of receipt on behalf of the Company not essential to accrual of liability.*

Where goods are tendered to the appropriate official of a Railway Company for despatch to a particular destination and are accepted by him, the liability of the Company in respect of such goods accrues from the time when the goods are so accepted, and is not dependent upon the granting or withholding of a receipt for the same on behalf of the Company by the official who has accepted the goods *Banna Mal* v *The Secretary of State for India*, (1) distinguished and doubted.

THIS was an application in revision under the Provincial Small Cause Courts Act, 1887. The facts of the case are stated in the following orders of TUDBALL, J., before whom the case first came. They will also be found in the judgment of PIGGOTT, J.

TUDBALL, J.:—This application in revision arises out of a suit brought by the plaintiff to recover damages for goods which he had delivered to the East Indian Railway at the Agra city station for transmission to Amroha and which have been lost by the Railway Company. The court below has found

* Civil Revision No 48 of 1920

(1) (1901) I. L. R., 23 All., 367.

that the bale of gunny bags in question was taken by the plaintiff to the goods shed and left there and that the bale has been lost. It then went on to hold in view of the decision of this Court in *Banna Mal* v. *The Secretary of State for India in Council* (1), that as no railway receipt had been granted by the Company to the plaintiff the liability of the Company had not commenced and therefore the Railway Company could not be held liable for the loss. It accordingly dismissed the suit. I am asked in revision to pay special attention to the decision of the Bombay High Court in *Ram Chandra Natha* v. *The Great Indian Peninsula Railway Company* (2) and also to the decision of the Calcutta High Court in *Jalim Singh Kotary* v. *Secretary of State for India* (3), and I am asked to refer the question if necessary to a larger Bench, as the decision of this Court reported in *Banna Mal* v. *The Secretary of State for India in Council* (1) appears to be incorrect. So far as my own personal opinion is concerned, I agree with HEATON, J., where he says that "a delivery to be carried by Railways means something more than a mere depositing of goods on the Railway premises; it means some sort of acceptance by the Railway, a taking as well as a giving. When that taking occurs is a matter which depends on the course of business and the facts of each particular case; but it certainly may be completed before a railway receipt is granted." The Bombay High Court in that case held that "the commencement of the liability of a Company for goods delivered to be carried under section 72 was in no way dependent upon the fact of a receipt having been granted but must be determined on evidence quite independently of rule 2 under section 47 of the Indian Railways Act." Before I can consider what steps to take I must have a clearer finding of the facts than that at which the court below has arrived. The mere bringing of the goods and the leaving of them at the railway station by the plaintiff's servant is insufficient to throw any liability on the Railway Company. There must be evidence of a further step namely, that the Railway Company's officials have actually taken over the goods voluntarily

(1) (1901) I. L. R., 23 All., 367. (2) (1915) I. L. R., 39 Bom., 485.
(3) (1904) I. L. R., 31 Calc., 951.

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SOHAN PAL, MUNNA LAL v. THE EAST INDIAN RAILWAY COMPANY

into their possession, that is, that there has been an actual handing over or delivery to the Railway Company and an acceptance by the Railway Company's servants. It is urged that the plaintiff's servant has alleged that a Forwarding Note was accepted and that the goods were marked and weighed. The lower court has not come to any finding on these facts. I therefore remit the following issue to the court below :—

"Was the bale of gunny bags in question actually handed over by the plaintiff's servant to the Railway officials and accepted by the latter or not?"

The lower court will note that the decision of this issue depends considerably upon the ordinary course of business at the booking station in the course of which goods are offered and accepted for transport. The parties may give further evidence on this point. On receipt of the findings the usual ten days will be allowed for objections.

On receipt of the findings the following order was passed :—

TUDBALL, J :—The finding of the court below on the issue referred is that the gunny bags in question were actually handed over by the plaintiff's servant to the Railway officials and accepted by the latter though no receipt was actually granted. In my opinion, in these circumstances, the Railway Company, having accepted delivery of the goods, were liable for the loss thereof though the Company had not actually granted a formal receipt. In my opinion the rulings of the Bombay High Court and Calcutta High Court seem to be correct and the decision of this Court in *Banna Mal* v. *The Secretary of State for India in Council* (1) to be incorrect. As I cannot override a two Judges' decision of this Court I refer the case to a Bench of two Judges. I think it would be advisable that that Bench should refer the case to the Chief Justice with a view to the constitution of a larger Bench.

The case was then laid before a Division Bench which passed the following order :—

WALSH and WALLACH, JJ. :—It is agreed in this case that in order to follow the decisions in the cases cited from Bombay and Calcutta by our brother TUDBALL it would be necessary to

(1) (1901) I. L. R., 23 All., 367.

disagree with a decision of this Court reported in I. L. R., 23 All., 367. As matters stand the construction of section 72 of the Indian Railways Act differs radically in the Calcutta and in the Allahabad High Courts, both of them being on the system of the East Indian Railway. Counsel for the Railway informs us that it is desired that the matter should be reconsidered in this Court with a view to a definite decision upon the point. We, therefore, without deciding it ourselves, which will only accentuate the controversy, refer the matter to the Chief Justice. The question is, was the case of *Banna Mal* v. *The Secretary of State for India* (1) rightly decided?

The application was, by order of the Chief Justice, laid before a Bench of three Judges.

Dr. *Kailas Nath Katju*, for the petitioner.

Pandit *Ladli Prasad Zutshi*, for the opposite party.

PIGGOTT, J. :—This is an application in revision against a decision of the Judge of the Court of Small Causes at Agra. The plaintiff sues the East Indian Railway Company, through its agent, for damages for the loss of a consignment, namely, a package of gunny bags, alleged by him to have been delivered to an authorized agent of the Company at Agra for carriage to Amroha, which certainly never reached its destination. There was some conflict of evidence as to the facts. The Railway Company in the first instance denied that the plaintiff had ever even brought to their office at Agra any such package as that referred to in the plaint. Their main defence, however, was of a technical nature. They called attention to a notification published in the *Gazette of India* of the day of 5th July, 1902, vide page 504 of Part I, notification No. 231, dated the 3rd day of July, 1902, in which certain rules were notified and the sanction of the Governor General in Council to the same published for general information. These rules purport to have been made under the power conferred by section 47, sub-section (1), clause (*f*), of the Indian Railways Act (IX of 1890). One of them is in the following words :—"Goods will in all cases be at the owner's risk until taken over by the Railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorized Railway servant." The Small Cause Court, after investigating the facts found them generally in favour of the plaintiff. The

(1) (1901) I. L. R., 23 All., 367.

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Piggott, J.

learned Judge, however, felt himself constrained to hold, with reference to a reported decision of this Court in *Banna Mal* v. *The Secretary of State for India* (1), that the process of delivery by the plaintiff to the Railway Company's agent had not been completed, because no receipt had been granted by the latter to the former. He dismissed the suit accordingly and the plaintiff applied in revision to this Court. The application was entertained by a learned Judge of this Court who, for reasons given in his order, remitted an issue to the trial court for determination. The issue is in these terms:—"Was the bale of gunny bags in question actually handed over by the plaintiff's servant to the Railway officials and accepted by the latter or not?" In remitting this issue the learned Judge added the following observations:—"The lower court will note that the decision of this issue depends considerably upon the ordinary course of business at the booking station in the course of which goods are offered and accepted for transport. The parties may give further evidence on this point." Neither party offered further evidence upon the remitted issue and the finding of the lower court has been recorded upon the evidence tendered at the original trial. The finding is in favour of the plaintiff on both points; *i.e.*, the bale in question was actually handed over by the plaintiff's servant to the Railway officials and was accepted by the latter. Upon this the case has been referred to a Bench of three Judges in order that the principles laid down in *Banna Mal* v. *The Secretary of State for India* (1) may, if necessary, be further considered. Our attention has been drawn to the fact that this decision has been commented upon by two other High Courts. The cases in question are those of *Jalim Singh Kotary* v. *Secretary of State for India* (2), and *Ram Chandra Natha* v. *The Great Indian Peninsula Railway Company* (3). We find, also, that in a subsequent case, *Narsing Girji Manufacturing Company* v. *Great Indian Peninsula Railway* (4), which has not been printed in any of the authorized reports, but which is to be found in the 21st volume of the Bombay Law Reporter at page 406, a Bench of that Court has

(1) (1901) I. L. R., 23 All., 367.
(2) (1904) I. L. R., 31 Calc., 951.
(3) (1915) I. L. R., 39 Bom., 435.
(4) (1918) 21 Bom. L. R., 406

re-affirmed the principles laid down in *Ram Chandra Natha's* case (1) mentioned above.

I am inclined to doubt whether the principle of law about which this Court is supposed to have differed from the High Courts at Bombay and at Calcutta really arises in the present case. The rule to which we have been referred occurs in a notification dealing with wharfage, and section 47 (1) (*f*) of the Indian Railways Act empowers the Railway Companies to make general rules consistent with the Act for regulating the terms and conditions on which the Railway administration will warehouse or retain goods at any station on behalf of a consignee. In the present case the Court has believed the story told by the plaintiff where there is a conflict between his evidence and that of the booking clerk and of another servant of the Company who were called for the defendant. According to the plaintiff's story no question of wharfage arose. His package was taken over for despatch and it never reached its destination. The court below, without recording a positive finding on the point, has given very good reasons for believing, on the evidence, that the package in question was actually put upon the rail and was mis-sent to another destination and lost in consequence of having been so mis-sent. Further, the expression "shall be at owner's risk" is in itself a technical one. There are several kinds of "owner's risk," and the Railway Company's manual which has been produced before us shows that responsibility for goods made over to the Railway Company may be differently divided between the owner and the Company, according as to whether the former elects to consign his goods on the terms provided by "Risk note A" or on the terms provided by "Risk note B." Whatever might be the case if the package in question had been destroyed by fire, for instance, while lying on the Company's premises at Agra, it is by no means clear that the expression "owner's risk" in this notification would exempt the Railway Company from liability, if in fact the package has been totally lost and the failure to deliver the same can be traced to negligence on the part of the Company's servants in sending it to a wrong destination.

(1) (1915) I. L. R., 39 Bom., 495.

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Piggott, J.

As, however, the case has been referred to a Full Bench for an expression of opinion on the general questions of law involved, and those questions have been argued before us, I think it advisable to add a few words. It seems to me that, if a rule like that relied upon by the Railway Company in the present case, (a rule supposed to have been made in virtue of the powers conferred by section 47 of Act No. IX of 1890), is put forward as limiting the statutory liability imposed upon the Railway Company by section 72 of the same Act, then that rule is inconsistent with the provisions of the Act and is of no effect. I do not think it is open to the Railway Company to enact, by means of a rule, that although as a matter of fact goods have been delivered to a duly authorized servant of the administration to be carried by the railway, nevertheless the court shall not deem them to have been so delivered unless and until the railway servant in question has performed a particular act. To this extent I agree with the decision of the Bombay High Court in *Ram Chandra Natha's* case (1).

In argument before us an alternative case was put forward on behalf of the Railway Company, differing from that upon which the question was litigated in the court below. Our attention was called to section 54 of the Indian Railways Act (No. IX of 1890), which empowers a Railway Administration to impose conditions, not inconsistent with the Act or with any general rule thereunder, with respect to the receiving, forwarding or delivering of any animals or goods. We were asked to hold, in effect, with reference to certain public notifications said to have been issued by the East Indian Railway Company, and reproduced in a manual of general rules shown to us, that this Company had given general notice to the public that any person desiring to despatch goods for transit by that Company should retain the same under his own supervision and consider himself responsible for their safe custody, until he held a receipt properly made out by the railway servant responsible for taking over delivery of the goods. In reality the line of argument here sought to be taken was anticipated by the learned Judge of this Court who remitted for trial the issue to which reference has

(1) (1915) I. L. R., 39 Bom., 485.

already been made. It would have been open to the Railway Company at the trial of that issue to bring forward the facts which have been pressed upon us in argument regarding the public notification of this alleged rule, governing the delivery and receipt of goods at their railway stations, to prove by evidence the fact of such publication and the existence of a regular course of business founded upon the general knowledge by the public of the existence of such a rule. The Railway Company having failed to produce any fresh evidence on the remitted issue, it seems to be impossible for us to take up the question from the point of view now pressed upon us. The submission that any such public notification was issued by the Railway Administration to the public is not really supported by any evidence before us, nor have we any evidence as to the existence of such a general understanding or such an established course of business. On the contrary the plaintiff has been believed in his evidence where he says that as a matter of fact, after his package or bale had been taken over by the goods clerk and duly marked, he was told to go away and come back for a railway receipt in a couple of days' time or so, as nothing further could be done at the moment because the particular line along which he desired his goods to be despatched was blocked. If this is to be treated as a finding of fact, it scarcely leaves room for the alternative argument which has been pressed upon us. For these reasons I would accept the application in revision, set aside the order of the court below and decree the plaintiff's claim with costs throughout. In view of the circumstances of the case we should allow counsel for the applicant the full amount of the fee certified by him.

WALSH, J.:—I entirely agree. The primary and fundamental responsibility of a Railway Company entrusted with goods under a contract either to despatch or to warehouse them is defined in section 72 of the Railways Act as that of a bailee for reward as defined in sections 151, 152 and 161 of the Indian Contract Act of 1872. Those sections, of course, cannot be construed without first interpreting the contract of bailment as defined in section 148 of the Indian Contract Act, which again involves the definition of "Delivery" as contained in section 149 of the

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Walsh, J.

Indian Contract Act, and the two sections 148 and 149 are equally incorporated with the Railways Act and define and control the liability of the Railway Company. Whatever rules the Company may make under its statutory authority contained in the same Act, they cannot, and it is provided by the statutory authority enabling them to make such rules that they shall not, make rules inconsistent with the Act. It, therefore, follows that no rule, which any Company can make, can cut down, control or limit its liability which is the creature of statute under section 72, and, if a rule is relied upon by the Company which is inconsistent with that liability it has clearly gone beyond the authority created for making rules. In these railway cases half the difficulty is often created by failure on the part of the railway authorities themselves, or rather those who represent them in the courts, and the failure of mufassil tribunals, to clear their minds first as to what I have described as the fundamental and primary liability of the Railway Company. When one has done that, it is easier to see whether a suggested expansion or modification of it is really anything of the kind. Instead of that, it frequently happens that the courts are invited to plunge into a discussion of some rule or explanation which the Railway Company puts forward as being sufficient in itself to absolve it from all liability, very often without the Railway authorities themselves or those who present them in court really understanding what it is that they are relying upon. I think that is what has happened in this case. It is suggested that some general rules of the Company made under section 54 are sufficient to absolve the Company under the circumstances of this case, which are that a Company admittedly received goods for despatch to a particular destination and either sent them to the wrong one or lost them altogether. Apart from the contention that such general rules if they attempted to cut down the definition of "Delivery" would be inconsistent with the provisions of the Act which are incorporated with the Railway Act, I am of opinion that what is contemplated by section 54 are merely general conditions with regard to receiving, forwarding or delivering. It seems tautologous to say that that is contemplated because those are the actual words used. To my mind that section has nothing to do

with the responsibility of a company as bailee. A Railway Company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods. Section 54 enables it to make provisions or conditions with regard, for example, to the receiving of goods. It is not bound to receive goods at all unless they are first weighed, or unless they are properly labelled, but those provisions, namely, with regard to receiving goods, are antecedent to the act of delivery; in other words they provide that the Company may insist on the consignor doing certain acts before he is able to deliver the goods to the Company at all. Similarly, with regard to forwarding, for example, live stock and wild animals, they can reasonably insist on their being put under proper control. With regard to the trucks for the conveyance of live stock they can insist on the consignor approving of the means of transit proposed. All these matters are, I think, antecedent to the performance of the act which is legally and technically known as "Delivery." To my mind section 54 and rules thereunder have nothing to do with the case in hand. I am of the same opinion with regard to rule 2 which was sanctioned by the Governor General in 1902 under section 47 (1) (*f*) of the Railways Act and which was relied upon by the Company and has frequently been referred to in this controversy and the decided cases that have been cited to us. I hesitate to hold that that rule is inconsistent with anything contained in the Act. In my view it is not. If it were intended to lay down some rule which would have the effect of defining "Delivery," or deciding when delivery, in the sense in which it is used in the Contract Act, took place, then undoubtedly it would be inconsistent, or as stated in one case, *ultra vires*. It purports on the face of it to be a rule made for regulating the terms and conditions on which the Railway Administration will warehouse or retain goods at any station on behalf of the consignee or owner and it is placed under a heading, and finds itself in a collection of rules made under a heading, which runs as follows:—"I—*Wharfage on goods for despatch waiting to be consigned.*" It seems to me that that has nothing whatever to do with the liability of a Railway in

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Walsh, J.

respect of goods which have been actually accepted by a Railway servant for despatch and have been either despatched or lost. It is intended to define the boundary line, in cases where it would otherwise by debateable, which divides the owner's loss from the warehouseman's loss and, although the point does not arise in this case, I am inclined to think that, although that boundary line is fixed as being the time when the receipt is given by the Railway official, it only applies when in fact a receipt is given; and has no application when a receipt is not given; in other words, if the Railway official asks the consignor's consent to postpone the handing over of the receipt, nonetheless the case would have to be decided as if the receipt had been given when it would have been given in the ordinary course of business if the handing over had not been, for some special purpose and by common consent, waived.

Lastly, I would merely add that really the case in I. L. R., 22 Allahabad, does not govern this case, even if it were rightly decided. In my view it was wrongly decided. It was decided under a slightly different set of rules from the rules which are now before us, and on the principle of a decision in England in 1854 which the court followed without, I think, sufficient reason. When the facts of the English decision are studied it becomes apparent that there the plaintiff, knowing full well the course of business of the Company, had not merely waived some formal performance of an act like the handing over of the receipt, but had departed altogether from the practice at that particular station, and had left six pigs in the possession of one of the Railway porters to do what was necessary in order to consign them to London, making him, as the Judges held, for that purpose his servant. The Company had made rules for dealing with live stock delivered to them for despatch and the plaintiff did not attempt to carry out any of them, but merely left it to the Railway porter to carry them out, and in the leading text-book in England on "Carriage," I find the case cited for this proposition that "delivery must be in conformity with the known course of the Company's business." It has been found in this case on overwhelming evidence that it was, and there is nothing in the Company's rules, and in my opinion there could not in law be

anything, to cut down the Company's ordinary liability as a bailee after taking delivery.

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GOKUL PRASAD, J.:—I agree with the order of the Court and the reasons given by my brother PIGGOTT, to which I think it unnecessary to add anything.

BY THE COURT.—The application in revision is accepted, the order of the court below is set aside and the plaintiff's claim is decreed with costs throughout, the said costs to include the fee certified by the applicant's counsel.

Application allowed.

REVISIONAL CIVIL.

Before Justice Sir Pramada Charan Banerji.

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December, 2.

MUHAMMAD HASHIM (DEFENDANT) v. MISRI (PLAINTIFF),*

Act No. IX of 1872 (Indian Contract Act), sections 56 and 65—Lease—Property leased compulsorily acquired by Government—Right of lessee to obtain compensation from lessor.

If during the continuance of a lease of immovable property the subject of the lease is compulsorily acquired by Government under the provisions of the Land Acquisition Act, 1894, performance of the contract having thereby become impossible, the lessee is not tied to obtain from the lessor compensation for the loss which he has sustained in consequence of being deprived of the possession of the demised premises. *Dhanjeesay Soondardas* v. *Ahmedbhai Hubibbhoy* (1) referred to.

THIS was an application for revision of the decree of the Court of Small Causes at Cawnpore. The facts of the case sufficiently appear from the judgment of the High Court.

Babu *Sital Prasad Ghosh*, for the applicant.

Babu *Saila Nath Mukerji*, for the opposite party.

BANERJI, J.:—The applicant Muhammad Hashim owned a flower garden in the city of Cawnpore which he let to the plaintiff for one year from March, 1920, to the following March, on a rent of Rs. 230. On the 15th day of November, 1920, the garden was acquired under the Land Acquisition Act for improvements in Cawnpore, and the plaintiff was deprived of possession. He brought the present suit in the Court of Small Causes to recover Rs. 65 which he said was the loss incurred by him by reason of being deprived of possession of the garden in November, 1920.

* Civil Revision No. 79 of 1921.

(1) (1898) I. L. R., 23 Bom., 13.

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He also claimed Rs. 26 as costs of repairs made by him. The claim has been decreed. This application for revision has been filed by the defendant in respect of both the items mentioned above.

As regards the sum of Rs. 65 claimed by the plaintiff, it is not alleged that, if the plaintiff is entitled to recover it, the amount would be unreasonable or excessive. But what is urged is that under section 65 of the Contract Act, which the court below has applied, the plaintiff is not entitled to recover compensation. I do not agree with this contention. Under section 65 if a contract has become void, any person who has derived benefit under the contract is liable to compensate the other party to the extent of the benefit so received, In view of the provisions of section 56, the contract having become impossible of performance must be held to have become void. Therefore according to the provisions of section 65 the plaintiff would be entitled to compensation. The principle of the ruling of the Bombay High Court in *Dhuramsey Soonderdas* v *Ahmedbhai Habibbhoy* (1) applies to the present case. As by reason of the acquisition of the garden by Government under the Land Acquisition Act the plaintiff was deprived of the garden and the performance of the contract entered into with him by the defendant became impossible, he is entitled to be recompensed for the loss he has sustained.

As to the sum of Rs. 26 the court below has believed the evidence of the plaintiff that he spent Rs. 26 in repairs to the garden under the authority of the defendant. The fact that the garden had been let to the plaintiff for Rs. 230 and Rs. 200 only was realized from him, raises an inference in favour of the truth of the plaintiff's allegation that he had to incur some expenses for the repairs of the garden. Apparently Rs. 30 was withheld because the repairs had to be done. Reliance is placed upon the fact that before the Land Acquisition Officer mention of the repairs had not been made in the deposition recorded. In that deposition the total amount of the rent was put down as Rs. 250 whereas as a matter of fact the garden had been let for Rs. 230 only. There was no question as to what repairs the plaintiff had made and, therefore, the omission of the repairs in that deposition did not detract

(1) (1898) I. L. R., 23 Bom., 15.

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from the credibility of the plaintiff whose deposition was accepted by the court below. This application is without force. I accordingly dismiss it with costs.

Application dismissed.

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Piggott and Mr. Justice Walsh.

1921 *December*, 8.

SHIAM LAL (DEFENDANT) *v.* MUSAMMAT LALLI AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), *order I, rule 8—Suit in representative capacity—Suit not invalidated by omission to publish notice.*

Order I, rule 8, of the Code of Civil Procedure (1908) requires that when a plaintiff brings a suit in a representative capacity he must first obtain the leave of the court to bring such a suit, and when the leave is granted, the court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are peremptory and the court is bound to issue notice as required by the rule. If, however, the court omits to issue notice, the result is not necessarily that the entire suit is vitiated and must be dismissed. The irregularity may be cured in appeal by the appellate court remanding the case to the court of first instance in order that the omission may be repaired. *Mukh Lal Singh v. Jagdeo Tewari* (1) referred to. *Dhunput Singh v. Paresh Nath Singh* (2) referred to by PIGGOTT, J.

THE facts of this case are as follows:—

The suit was brought by the respondents, who were residents of a certain mohalla in the city of Agra and sought to prevent the defendant from interfering with a *chabutra* which they alleged had been dedicated as a shrine and set apart for the use of the residents of the mohalla. The suit was instituted in a representative capacity under order I, rule 8, of the Code of Civil Procedure and the plaintiffs obtained what is called 'a representation order' from the court of first instance. Notice of the institution of the suit was, however, not given to the numerous persons interested—in this case the other residents of the mohalla—as required by the aforesaid rule, and this apparently was due to an oversight on the part of the officer of the court.

*Second Appeal No. 408 of 1920 from a decree of T. K. Johnston, District Judge of Agra, dated the 26th of February, 1920, confirming a decree of Tufail Ahmad, Munsif of Agra, dated the 14th of June, 1919.

(1) (1908) I. L. R., 35 Calc., 1021. (2) (1893) I. L. R., 21 Calc., 180.

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The Munsif of Agra decreed the suit and the lower appellate court confirmed the Munsif's decree.

The defendant appealed to the High Court, contending that the plaintiff's entire suit was vitiated by the absence of the required notice and should be dismissed.

The appeal originally came before WALSH, J., at whose instance it was referred to a Full Bench.

Munshi *Harnandan Prasad* (for Munshi *Narain Prasad Ashthana*), for the appellant:—

The issue of the notice under order I, rule 8, of the Code of Civil Procedure was necessary. The Legislature having used the word 'shall', the provision of law was not complied with if no notice was given. This case was referred to this Full Bench as there appeared to be a conflict of authorities between *Jawahra* v. *Akbar Husain*, (1) and *Gulba* v. *Basanta* (2). In cases like this, the issuing of notice in accordance with order I, rule 8, of the Code of Civil Procedure is not a mere simple formality. It is a condition precedent and the case could not be proceeded with unless the permission to sue in a representative capacity was made perfect by the court's issuing the required notice. The court was bound to do a certain act and having failed to do that, it had no jurisdiction to proceed with the case. A number of questions might have arisen if the notices had been served on the other persons interested and those questions had to be decided before the case could be proceeded with. The court ought to have issued the notices before the permission to sue in a representative capacity could be availed of. The language used in the rule is clear. The words 'but' and 'shall' are significant. The suit having ceased to be representative it became of a private nature. The original suit fails because the decree obtained was not the decree sought.

Pandit *Mangal Prasad Bhargava*, for the respondent:—

The suit was instituted in accordance with the provisions of law as laid down in order I, rule 8, of the Code of Civil Procedure. Notices were not issued to the persons interested, owing to the negligence of the court. It appeared that the office was to be blamed for that. It was the duty of the court

(1) (1884) I. L. R., 7 All., 178. (2) (1910) I. L. R., 32 All., 284.

to cause service of notices and the plaintiffs ought not to suffer for the court's negligence nor should the suit be dismissed. I am supported by *Mukh Lal Singh* v. *Jagdeo Tewari* (1). Reference was also made to *Ganapati Ayyan* v. *Savithri Ammal* (2), *Monmotho Nath Das* v. *Harish Chandra Das* (3), *Baiju Lal Parbatia* v. *Bulak Lal Pathak* (4) and *Dhunput Singh* v. *Paresh Nath Singh* (5).

Munshi *Harnandan Prasad* in reply:—

None of the cases referred to help the plaintiffs. In fact I. L. R., 35 Calc., 1021, supports the defendant in a way. If other members of the mohalla had been parties to the suit they might have supported the defendant. The provisions of order I, rule 8, of the Code of Civil Procedure, must be strictly complied with. I rely on *Harbans Narain Singh* v. *Bhajoo Nonia* (6).

BANERJI, J.:—In the city of Agra there is a mohalla called mohalla Poorabyan in which there is a platform. To the west of that platform is the house of the defendant and between the house and the platform there was a wall in which, according to the lower appellate court, there was a niche which was worshipped by some residents of the mohalla. The present suit was instituted by two persons residing in that mohalla, one of whom stated that her father, one Pooran, had made a dedication of the land on which the platform exists to a deity called *Bhuinya* and that the platform had been built on the land and had been used by all the residents of the mohalla. The other plaintiff, who is a resident of the mohalla, also made statements to the same effect. Their complaint is that the defendant has set up a door in his wall and has also opened out a portion of the wall which separated his house from the chabutra and has thereby opened a passage over the chabutra. They accordingly instituted the present suit for an injunction restraining the defendant from passing over the chabutra. They also claimed to have the wall, alleged to have been pulled down by the defendant, rebuilt. The plaintiffs distinctly stated in their plaint that they instituted the suit under order I, rule 8, of the Code of Civil Procedure on behalf of all

(1) (1908) I. L. R., 35 Calc., 1021.
(2) (1897) I. L. R., 21 Mad., 10.
(3) (1906) I. L. R., 33 Calc., 905.
(4) (1897) I. L. R., 24 Calc., 935.
(5) (1893) I. L. R., 21 Calc., 180.
(6) (1919) 49 Indian Cases, 796.

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the residents of the mohalla who are interested in the platform. With the plaint they filed an application asking for leave, under order I, rule 8, of the Code of Civil Procedure, to bring the suit on behalf of all the residents of the mohalla. The court granted the leave asked for and made an order to the effect that an advertisement should be made giving notice of the suit apparently to all persons concerned. As a matter of fact no notice was issued and no advertisement was made as directed by the court. The lower appellate court says that this omission was due to the negligence of the officials of the court. In the court of first instance, however, no question was raised by the defendant on the ground that no notice was issued. The defence was that the platform and the site of it belonged to the defendant as his own private property and that he was entitled to use it for passage into his own house. The first court proceeded to try this point, and finding for the plaintiffs made a decree against the defendant. On appeal the question was raised whether the omission to issue a notice was fatal to the suit. That court held against the defendant on the point and on the merits agreed with the court of first instance that the platform was used by the residents of the mohalla as a shrine and was in fact a shrine to which the defendant had no title. On second appeal the question was again raised that, inasmuch as notice was not actually issued as required by order I, rule 8, the suit ought to have been dismissed. The case has been referred to a larger Bench by the learned Judge before whom the second appeal came on for hearing, and he apparently was of opinion that there was some conflict between the ruling of the Full Bench of this Court in *Jawahra* v. *Akbar Husain* (1), and *Gulba* v. *Basanta* (2). These two cases have also been referred to in the argument before us and in my opinion the question we have to decide in this appeal was not considered and decided in those two cases. In the Full Bench case the real point which was decided was whether the plaintiffs could maintain the suit, and it was held that they were competent to do so in their own individual right and the question of their representative capacity was not determined. The same was the case with the other ruling mentioned above. In that case also

(1) (1894) I. L. R., 7 All., 173. (2) (1910) I. L. R., 32 All., 284.

it was held that order I, rule 8, which corresponds to section 30 of the former Code of Civil Procedure, did not apply to that case and that the plaintiffs were entitled to maintain the suit in their own right. There is, therefore, no conflict, in my opinion, between the two rulings to which I have referred. The real point to be considered is whether the omission of the court to issue notice as required by order I, rule 8, vitiates the whole suit and entails a dismissal of it. In my opinion the result of the omission to issue notice is not the dismissal of the suit. It is an irregularity committed by the court which omitted to issue the notice. Order I, rule 8, requires that when a plaintiff brings a suit in his representative capacity he must first obtain the leave of the court to bring such a suit and when the leave is granted, the court shall issue notice that the suit has been instituted. The provisions of the section as to the issue of notice are undoubtedly peremptory and the court was, therefore, bound to issue notice as required by the rule. If the court omitted to issue notice it committed an irregularity, and a grave irregularity, which might be remedied by the appellate court sending back the case to the court of first instance to comply with the requirements of the law. A number of rulings have been cited to us but the only one which seems to me to approach the case most nearly is the decision of the Calcutta High Court in *Mukh Lal Singh* v. *Jagdeo Tewari* (1). In that case the appellate court had dismissed the suit on the ground that notice had not been issued by the court of first instance as required by the section which governed the case. It was held that the suit ought not to have been dismissed, but the court remanded the case in order that the irregularity committed by the court of first instance might be remedied by the issue of notice. It seems to me that this is the proper view to take of the matter now before us, and, as the court of first instance omitted to issue notice, the right course would be to send back the case to the court of first instance with directions to take up the case at the stage at which it ought to have issued notice and to issue notice and then proceed with the suit and re-try it. I think this is what should be done in all cases in which an omission of this kind

(1) (1908) I. L. R., 35 Calc., 1021.

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occurs. I had, however, considerable hesitation in sending back the case to the court of first instance inasmuch as it seems to me that this irregularity did not affect the case on the merits. It was not the defendant's contention that he had the permission of the other residents of the mohalla to open a door; on the contrary, he was repudiating the rights of the residents of the mohalla who alleged that the platform in question was a shrine which was held by all of them for general worship. The defendant claimed to be the owner of the land and, therefore, the omission of the notice did not, in my opinion, prejudice him on the merits. I am also of opinion that no question of jurisdiction was involved in the case. The learned Munsif was competent to hear the suit but he only committed an irregularity in the exercise of his jurisdiction. However, as my learned colleagues are of opinion that the case should go back to the court of first instance in order that the provisions of law should be complied with and that no court should overlook or omit to carry out what the law requires, I am prepared to agree to an order remanding the case to the court of first instance for the purpose mentioned above.

PIGGOTT, J.:—I concur generally in what has just been said. I felt impressed by the arguments based on the wording of section 99 of the Code of Civil Procedure, and undoubtedly one would hesitate about having a re-trial of a suit of this sort in view of the pleadings and of the case set up by the defendant in the trial court, if it were possible to do so. My real difficulty in this case is that I think that in a sense a question of jurisdiction is involved: that is to say, if the plaintiffs are to be allowed to sue in a representative capacity and if there is a decree in their favour at all on this claim, it must be a decree granted to them in a representative capacity. The court below gave them the required permission, but neglected to comply with the mandatory provisions of the law as to the procedure to be followed in order to make such permission effective. I am much impressed by the view taken by the learned Judges in *Dhunput Singh* v. *Parsch Nath Singh* (1), where they suggest that any permission granted prior to the issue of the notice required by

(1) (1893) I. L. R., 21 Calc., 180 (187).

what is now Order I, rule 8, of the Code of Civil Procedure, is subject to the result of the issue of such notice. In effect, I am inclined to doubt whether, in the absence of such notice, the plaintiffs could hold any thing more than a conditional permission to sue in a representative capacity, granted subject to necessary conditions which were never fulfilled. If so, it becomes doubtful whether the decree in their favour as it stands is really a decree granted to them according to the terms of their claim, that is to say, in a representative capacity. I feel clear in my own mind that, if I had been sitting in place of the learned District Judge of Agra as a court of first appeal, I would have declined to bring this particular case within the scope of section 99 of the Code of Civil Procedure and would have sent it back to the learned Munsif with a direction to obey the clear provisions of the law. I prefer to do as a court of second appeal what I think the lower appellate court should have done, and for this reason I think the order which ought to be passed is as suggested at the close of the judgment of Mr. Justice BANERJI.

WALSH, J.:—I agree with the order proposed. My opinion is that negligence to comply with the provisions of Order I, rule 8, is fatal to the granting of a decree to a plaintiff as representing the inhabitants of a mohalla, such as the plaintiffs seek and have obtained. With regard to the suggestion that this point does not affect the merits of this particular case or the jurisdiction of the court under section 99 of the Code of Civil Procedure, my view is that it does both. Permission in terms of the rule is fundamental to representative procedure. The court has no jurisdiction to ignore or to break its own rules or to grant the decree in the face of a breach of law. No doubt in this case it was an oversight by the court. That makes no difference. We do not know whether the plaintiffs' claim to represent the whole class is well-founded in fact, and the court on hearing objections might refuse the permission sought to sue in a representative capacity. I am quite satisfied that the dismissal of this suit would have bound all the class whom the plaintiffs claim to represent. If the suit is either decreed or dismissed without notice to the class which is supposed to be represented, their mouth is closed. They might no doubt seek

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by application to set the decree aside. In my opinion we ought not to pass a decree which we also think ought to be set aside if it was objected to. The objection should precede and not follow the decree. I agree with Mr. Justice BANERJI that there is no conflict between I. L. R., 32 All., 284 and I. L. R., 7 All., 178, but there is direct conflict between the head-notes. I am now satisfied that the head-note in I. L. R., 32 All., is wrong and misrepresents the decision. It says that the court decided that where numerous persons are similarly interested in the subject-matter of the suit, a suit brought by one or more of the persons for the protection of the rights of all is not bad merely because the plaintiffs have not obtained permission. The insertion of the word 'all' in that head-note alters the entire decision. The word is not to be found in the judgment and it is clear on examination that the court was dealing with a suit by some members suing in their own right and not on behalf of all the members of the community. The case was relied on in argument before me as binding upon me and I was misled by the head-note into thinking that the case conflicts with the principles laid down in I. L. R., 7 All. I merely mention this fact because the expression is repeated twice in the Calcutta decision. To say that order I, rule 8, is not peremptory is likely to create misunderstanding by persons who do not understand what is really meant by the decision. If there were no provision upon the subject in the new Code, the old Code which compelled everybody who was interested in the subject-matter of the suit either to join as plaintiffs or as defendants would presumably be followed. It is the duty of the plaintiff who makes an application unless he can come within such express provision to enable him to sue in his representative capacity to join all persons as parties in his suit. Order I, rule 8, enables him with the permission of the court to dispense with that which would otherwise be necessarily binding upon him, namely, the joinder of other members, and to confine the claim to himself. I agree that the case ought to go back to the court of first instance.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of the courts below are set aside and the case is remanded to the court of first instance through the lower

appellate court with directions to restore it to its original number in the register and to try it after issue of notice as required by order I, rule 8, of the Code of Civil Procedure. The costs of this appeal will follow the event.

Appeal allowed.

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SHIAM LAL v. MUHAMMAT LALLI.

MISCELLANEOUS CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

RAM SUKH (DEFENDANT) *v.* MRS. L. E. O'NEAL (PLAINTIFF)* *Regulations*—1877—*III* (*Ajmer Laws*), *sections* 6 *and* 9—*Pre-emption*—"*Sale*"—*Possession given and price paid, but no deed of sale executed.*

1921 *December*, 13.

Held that according to the law in Ajmer-Merwara a right of pre-emption may be enforced where possession of the property claimed has been delivered and the price paid, although no deed of sale has been executed and registered. *Begam* v. *Muhammad Yakub* (1) referred to.

THIS was a reference made under the Ajmer Courts Regulation, 1877, by the Chief Commissioner. The facts out of which it arose are thus stated in the referring order:—

"A resident of Ajmer named Birdha mortgaged his land usufructuarily to one Ram Sukh and subsequently sold it to him for Rs. 400. In order, however, to defeat a possible claim for pre-emption on the part of one Mrs. O'Neal, who owned the adjoining plot, no formal sale-deed was executed. This, at any rate, is the explanation given in the statement of the vendor and he further states that Ram Sukh paid the full price agreed upon and that his possession then changed from that of mortgagee to that of owner. Mrs. O'Neal becoming aware of the transfer filed a suit for pre-emption in respect of the plot of land. The claim was contested by Ram Sukh, who pleaded, *inter alia*, that as there was no regular sale-deed as required by section 54, Transfer of Property Act, there was no legal sale and, therefore, no suit for pre-emption lay. The court of first instance accepted the defendant's plea and dismissed the suit, but the Additional District Judge in appeal, following the ruling in 16 Allahabad, 344, held that the plaintiff had obtained a right of pre-emption inasmuch as the defendant Ram Sukh had in fact purchased the plot

* Civil Miscellaneous No. 356 of 1921.

(1) (1894) I. L. R., 16 All., 344.

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and had paid the consideration and obtained possession and that the statement of the vendor Birdha showed that no sale-deed had been written for the very reason that Ram Sukh apprehended that the plaintiff might bring a suit for pre-emption. He, ther efore, decreed the suit.

In Ajmer-Merwara, the law governing pre-emption is given in Chapter 2 of the Ajmer Laws Regulation (III of 1877) though no definition of sale is given. The law of pre-emption obtaining in Ajmer-Merwara appears to be the same as that in force in Oudh. In the above circumstances the question of law which the Hon'ble the Chief Commissioner wishes to refer for the opinion of their Lordships of the Allahabad High Court is as follows:—

'As a law of pre-emption is provided by Statute in Ajmer-Merwara, should the Courts in this Province, in deciding whether a right to sue for pre-emption has arisen, accept the definition of sale contemplated in Muhammadan Law in accordance with the ruling in 16 Allahabad, 344, or decide the question of sale with reference to the provisions of the Transfer of Property Act?'

The Hon'ble the Chief Commissioner is inclined to concur in the view taken by the court of first instance, but as he understands that the ruling given in 16 Allahabad, 344, is followed in Oudh and as there is no precedent dealing with the question so far as Ajmer-Merwara is concerned, he would be grateful for a ruling from their Lordships of the Allahabad High Court."

On this reference—

Munshi *Ram Nama Prasad* for the petitioner.

The opposite party was not represented.

PIGGOTT and WALSH, JJ.:—This is a reference from the Chief Commissioner of Ajmer-Merwara We have heard it today in the presence of counsel representing one of the parties concerned, but in the absence of the other party, Mrs. L. E. O'Neal. A communication has been received from the latter to the effect that she is not in a position to employ counsel to argue her case but would have wished to be present in person at the hearing. As she was prevented from being

present in person by the state of her health she asks us to postpone the hearing. In view of the purely legal and technical nature of the question submitted to us we find it a little difficult to understand what purpose would be served by Mrs. O'Neal being present in person. We decided in any case to hear counsel for the opposite party in the first instance, reserving the question whether we should fix a further date to permit of Mrs. O'Neal's presence after we have heard and considered his arguments. As we are prepared to return an answer to the reference which is in substance the answer Mrs. O'Neal would desire, we do not think it necessary to postpone the matter further. The question referred is this:—"As a law of pre-emption is provided by Statute in Ajmer-Merwara, should the courts in this Province, in deciding whether a right to sue for pre-emption has arisen, accept the definition of sale contemplated in Muhammadan Law in accordance with the ruling in I. L. R., 16 Allahabad, 344, or decide the question of sale with reference to the provisions of the Transfer of Property Act?"

It seems clear to us that the question must be answered with reference both to the principles underlying the Allahabad decision and to the wording of the Ajmer Regulation (No. III of 1877) where it deals with the question of pre-emption. We note particularly the definition in section 6, Chapter II, of the said Regulation, where a right of pre-emption is stated to be a right to acquire immovable property in preference to other persons in certain specified cases. Then in section 9 we find that a right of pre-emption arises in certain cases in respect of property to be sold, not necessarily property which has been sold already. Under the circumstances we are clearly of opinion that the principles laid down in the Allahabad ruling mentioned in the reference, *Begam* v. *Muhammad Yakub* (1), should be followed in cases where a right of pre-emption is claimed under the statute law of Ajmer-Merwara. A further question may arise as to whether or not, after a pre-emption suit has been decreed under circumstances similar to those of the case now before us, the pre-emptor

(1) (1894) I. L. R., 16 All., 344.

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may not lawfully require and claim as one of the reliefs in the suit, the execution of a formal document completing the transfer in his favour, so as to fulfil the requirements of the Registration law and of section 54 of the Transfer of Property Act (IV of 1882). This question, however, does not directly arise out of the reference made to us, which we think we have sufficiently answered. As this reference has been heard *ex parte* we do not make any order as to the costs of the hearing in this Court.

Reference answered.

1921
December, 8

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

DEBI RAI AND OTHERS (APPLICANTS) *v.* PRAHLAD DAS AND OTHERS (OPPOSITE PARTIES).*

Act No. XXVI of 1920 *(Civil Procedure Code Amendment Act) section* 3 *(*1*) —Civil Procedure Code (Act V of* 1908*), order XLV, rule* 7*—Appeal to His Majesty in Council—Deposit of security—Limitation.*

Held that the provisions of Act No. XXVI of 1920 do not apply to an appeal from a decree passed before the coming into force of that Act.

THE facts of this case sufficiently appear from the order of the Court.

Maulvi *Iqbal Ahmad*, for the appellants.

Mr *Nihal Chand*, for the respondents.

MEARS, C.J., and BANERJI, J.:—Debi Rai and others, who are the appellants in this matter, had a decree passed against them on the 9th of December, 1920. On the 7th of June, 1921, they made an application that Rs. 4,000, then in existence in cash, might be received and war bonds or Government security notes might be purchased in the names of the petitioners. The order that was made on that application, which was, it is to be noticed, within six months from the date of the decree, was "lay before the Bench concerned." At the next sitting of the Bench concerned an application was made that this money might be received and the order was made. That order was made five days beyond the period of six months from the date of the decree. It should be

*Application to Privy Council Appeal No. 8 of 1921.

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stated that in the intervening period, namely, on the 22nd of April, 1921, the appellants obtained a certificate which fulfilled the requirements of the law. On the 21st day of November, 1921, the respondents lodged an objection to the admission of the appeal and prayed that the certificate of the 22nd of April, 1921, might be revoked. The ground on which they asked that this should be done is that the appellants were out of time on the 14th of June, 1921, when they made the payment into this Court. To obtain an order on this objection it is necessary for Mr. *Nihal Chand*, who appears on behalf of the respondents, to show that this case is governed by Act No. XXVI of 1920. Mr. *Iqbal Ahmad* has put a very short answer, which is this: he maintains that his decree being of the year 1920 one must look at the provisions of the Act of 1908 and order XLV, rule 7, as it was in its unamended state in the year 1920; and he claims that, by virtue of the decree having been made on the 9th of December, 1920, he is entitled as of right to six months from that date within which to make the deposit. He then points out that he attended here on the 7th of June, which admittedly is within six months, ready and willing to comply with the terms of the rule and that it was only by the circumstance that the proper Bench was not sitting on that date, or on the 8th or 9th of June, that he was unable to obtain an order from the Bench which would permit his depositing the money. We think that this application is governed by the Act of 1908. There is no need for Mr. *Iqbal Ahmad* to bring himself within any of the provisions of the Act of 1920, and indeed if he had come within that Act he would have been out of time. In these circumstances we are of opinion that the objection cannot prevail and that the application on the part of the respondents that the certificate may be revoked must be dismissed with costs.

Application rejected.

1921
December, 5.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BASHIR-UN-NISSA BIBI (DEFENDANT) *v.* ABDUR RAHMAN AND OTHERS (PLAINTIFFS.)*

Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 49 and 120 —Suit by a Muhammadan heir for share in inheritance—Limitation

Held that a suit by an heir of a Muhammadan to recover a share of the movable property left by the deceased is governed by article 120, and not by article 49, of the first schedule to the Indian Limitation Act, 1908 *Mahomed Riazat Ali* v. *Hasin Banu* (1) followed

THE facts of this case may be briefly stated as follows:—

The plaintiffs, claiming to be some of the heirs of one Fazal Haq, deceased, sued to recover possession of a certain share in the property left by him, on the allegation that this share belonged to them by right of inheritance but was in the possession of the widow. Fazal Haq had died on the 31st of August, 1909, and the suit was brought on the 31st of August, 1915. Besides a share in the immovable property the plaintiffs claimed a fourth share in certain specified movable property and cash, alleged to have been left by Fazal Haq, and prayed that one-fourth of the movable properties might be apportioned and awarded to them or, if that was not done, its value might be awarded in cash. One of the pleas raised by the defendant was that the claim for the movable properties was barred by time. The defendant also pleaded that besides the heirs enumerated by the plaintiffs Fazal Haq had left another heir, namely, his step-sister Musammat Azmat-un-nissa, and therefore the plaintiffs' share in the inheritance was less than that asserted by them. The court of first instance held that article 120 of the Limitation Act applied to the claim for movable properties and that the suit was, therefore, within time. The court, however, did not arrive at a definite finding on the question whether Fazal Haq had left a step-sister. The claim was decreed in full in respect of the immovable property and a certain sum was awarded to the plaintiffs in respect of the movable property. The defendant appealed to the High Court and at the first hearing an issue was remanded to the lower court for determination whether Fazal Haq had left a step-sister,

* First Appeal No. 882 of 1916, from a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 9th of June, 1916.

(1) (1893) I. L. R., 21 Calc., 157.

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Musammat Azmat-un-nissa. On return of the finding the appeal came on for final hearing.

Dr. *S. M. Sulaiman* and Dr. *Surendra Nath Sen*, for the appellant.

Mr. *B. E. O'Conor*, Maulvi *Iqbal Ahmad* and the Hon'ble Saiyid *Raza Ali*, for the respondents.

MEARS, C. J., and BANERJI, J.:—This appeal was argued on the 21st of December, 1920, before a Bench consisting of the Chief Justice and Mr. Justice Knox

It was evident that the matter could not be disposed of satisfactorily until the Court was informed whether Muhammad Fazal Haq had left a step-sister by the name of Musammat Azmat-un-nissa. The Bench, therefore, referred that question to the lower court with instructions to decide that issue. On the 19th of November of this year the lower court reported that nobody cared to prosecute the case and, therefore, that issue had never been determined. In those circumstances Dr. *Sen* says very fairly that he cannot resist the judgment of the lower court on the issue as regards the share of the immovable property and mesne profits. There was also a claim for a fourth share in movables and for partition so that specific articles could be allotted to the plaintiffs. The claim as actually put forward asked that the cash and articles mentioned in a certain list might be partitioned and one-fourth of the cash and one-fourth of the articles awarded to the plaintiffs. The claim then continued by putting a value upon the movables, dividing that by four, and asking that if the cash and articles were not partitioned Rs. 3,982 might be awarded as the price of the said articles. Dr. *Sen* contends that the method in which that claim is put forward brings the suit within article 49 of the first schedule to the Limitation Act of 1908. As admittedly Fazal Haq died more than three years before the institution of the action this claim for a partition of cash and movables would be time-barred by article 49 were the article to be applied. The lower court felt itself unable to distinguish the case of *Mahomed Riasat Ali* v. *Hasin Banu* (1), and we agree that the facts of this particular case before us are governed by the decision in

(1) (1893) I. L. R., 21 Calc., 157.

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that case The same point was taken there. It was said that the claim for partition of movables was barred because the claim fell within article 49. The Privy Council did not agree with that contention but held that the claim really fell within article 120 inasmuch as there was to be found in this first schedule to the Limitation Act no specific provision for a claim of this kind. As our view in this respect is the same as held by the learned Subordinate Judge, we are of opinion that on both grounds this appeal must be dismissed with costs. We accordingly dismiss this appeal with costs.

Appeal dismissed

1921
December, 9.

Before Mr. Justice Lindsay and Mr Justice Gokul Prasad.

ABDUL HAKIM KHAN (DEFENDANT) *v.* RAM GOPAL AND OTHERS (PLAINTIFFS.)*

Act No. I of 1872 (Indian Evidence Act), section 92, proviso (1)—Mortgage deed—Misdescription of property mortgaged—Admissibility of evidence to show what really was the property which the parties intended to be mortgaged.

By a deed executed in 1892 certain items of property were mortgaged, including a share in khata No 3 in mahal Ismail Beg The mortgage was renewed in 1897 and in the second deed the words "mahal Ismail Beg" were omitted in the schedule of the properties mortgaged. The mortgage was again renewed in 1907, when in the corresponding part of the schedule there was entered an item "khata No 3 in mahal Jafar Beg"

Held that it was open to the mortgagee to offer evidence to show that what was intended to be mortgaged was a share in mahal Ismail Beg, khata No. 3, and in so doing to refer to the two previous deeds.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *S. M. Sulaiman* and Munshi *Bhagwati Shankar*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

LINDSAY and GOKUL PRASAD, JJ.:—After hearing the learned counsel in this case we think the appeal must fail and the judgment of the court below must be affirmed.

The question now before us is a question of fact and there is a definite finding by the lower appellate court.

* Second Appeal No. 1245 of 1919, from a decree of Ganga Sahai, Additional Judge of Meerut, dated the 14th of August, 1919, modifying a decree of Kesh Prasad, Additional Subordinate Judge of Meerut, dated the 27th of May, 1919.

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ABDUL HAKIM KHAN v. RAM GOPAL.

The plaintiffs brought a suit on a mortgage and asked for sale of certain properties specified in the deed. With regard to one item of property the plaintiffs' plea was that the description of it in the mortgage-deed was wrong.

The mortgage deed purports to show that one of the items of the mortgaged property was khewat No. 3 in mahal Jafar Beg. The plaintiffs' case was that this description was a mistake and that what was mortgaged and what was intended to be mortgaged was khata No. 3 in mahal Ismail Beg.

It was alleged, and the fact is admitted, that the mortgagor Abdul Hakim Khan, who is the appellant here, has no interest in khata No. 3 in mahal Jafar Beg; on the other hand, it is proved that he had an interest in khata No. 3 in mahal Ismail Beg and that this interest is now, by reason of partition, included in the mahal called mahal Abdul Hakim.

The first court held that there was no proof of mistake. The lower appellate court has held that there was a mistake and it has found in favour of the plaintiffs.

It has been argued before us here that this finding of fact arrived at by the learned Additional Judge is not binding inasmuch as the learned Judge referred to evidence which was not admissible. We cannot agree with this contention. The learned Judge of the lower court traced the history of the mortgage in suit up to the first mortgage between the parties made in the month of June, 1892, which showed that in the mortgage of that date the mortgagor had mortgaged a share in khata No. 3 of mahal Ismail Beg along with other properties. That deed of 1892 was renewed by a later deed executed in 1897. Comparing the two deeds it appeared to the learned Judge of the court below that in copying out the list of items of property mortgaged a mistake was made in the deed of 1897. According to the judgment of the court below the mistake was that after the words "khata or khewat No. 3" the words "mahal Ismail Beg" were left out. It is an admitted fact that the mortgagor owned property in khata No. 4 of mahal Jafar Beg and so it seems to have been assumed that the entry regarding khata No. 3 from which the words had been omitted as we have said above, referred also to mahal Jafar Beg.

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ABDUL HAKIM KHAN v. RAM GOPAL.

The bond now in suit was executed in the year 1907 and the finding of the court below is that the mistake which was made in drawing up the deed of 1897 was again repeated in the document of 1907 now in suit. The learned Judge felt no doubt that there had been a clerical error and accordingly he allowed the plaintiffs' claim in respect of the property in mahal Ismail Beg.

We cannot allow the argument that the learned Judge of the court below was not entitled to look at the earlier documents of 1892 and 1897. In proviso (1) to section 92 of the Evidence Act it is laid down that any fact may be proved such as . . . mistake in fact or law which would entitle any person to any decree or order relating to a document. It cannot, therefore, be doubted that it was open to the plaintiffs to prove this mistake and the evidence which they produced to prove that fact was certainly admissible. The result, therefore, is that we affirm the decree of the court below and order that this appeal be dismissed with costs.

Appeal dismissed.

1921
December, 14.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

MAHADEO SAHAI (APPLICANT) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (1908), *section* 115—*Application for leave to sue* in formâ pauperis—*Order rejecting such application—Revision.*

Held by Walsh, J, that no application in revision under section 115 of the Code of Civil Procedure will lie from an order rejecting an application for leave to sue *in formâ pauperis* *Buddhu Lal* v *Mewa Ram* (1) followed

THE applicant in this case applied to the Subordinate Judge of Jaunpur for leave to sue *in formâ pauperis*. The suit which he proposed to file was against the Secretary of State for India in Council and other defendants. The Subordinate Judge, having regard to the particulars of the suit which were filed along with the application, came to the conclusion that they disclosed no cause of action against the Secretary of State, and upon that ground dismissed the application.

* Civil Revision No. 119 of 1920

(1) (1921) I L. R., 43 All., 654

The applicant applied in revision to the High Court.

Munshi *Harnandan Prasad*, for the applicant.

Dr. *S. M. Sulaiman* for the opposite parties.

PIGGOTT, J.:—This is an application in revision against an order rejecting an application for leave to sue *in forma pauperis*. So far as I am concerned I reserve the question whether an application in revision lies against such an order. Personally I think the question is distinguishable from that decided recently by a Full Bench of this Court (1), in that no suit was ever instituted in the court below, as the suit would only have commenced if the application had been accepted and the petition registered as a plaint. Moreover, the effect of the order brought before us in revision was to dispose, for the time being, of the entire matter pending in that court. However, reserving this point, I am clearly of opinion that the application before us must fail. The court below has written a long order, certain portions of which do in my opinion go beyond the jurisdiction of the court, at the particular stage then reached, as limited by rule 5 of order XXXIII of the Code of Civil Procedure. Nevertheless the order before us does in my opinion give adequate reasons, proceeding upon materials then properly before the court for rejecting this application. In substance the court below has held that the petition accompanying the application discloses no cause of action against the first defendant, namely, the Secretary of State for India in Council. In so holding I think the court below was clearly right and the finding has not been seriously contested in argument before us. All that the court below has done, after coming to that conclusion, is to say that the application as it stands, supported by the statement of particulars (*vide* order XXXIII, rule 2 of the Code of Civil Procedure) which actually accompanied it, should be rejected on the ground that it discloses no cause of action against the principal defendant. The question whether an application, supported by a somewhat different set of particulars, and alleging a cause of action against some only of the other defendants, would or would not have been maintainable, and would or would not have been accepted by the court below, is a matter which that court was not called upon to decide and has not

(1) (1921) I. L. R., 43 All., 564.

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decided. This application was in my opinion rightly rejected for the reasons already given. I would, therefore, dismiss this application with costs.

WALSH, J. :—I agree on the merits and I merely wish to add that in my view we could not have entertained this application on any ground, it not being a "case decided" within the meaning of the decision of the recent Full Bench (1), and that any previous decisions of this Court which have admitted revisions in the case of the rejection of an application to be allowed to sue *in formâ pauperis* must be treated as having been overruled.

Application rejected.

1921
December, 15.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

SURJAN SINGH AND OTHERS (DEFENDANTS) v CHATURA KUNWAR (PLAINTIFF).*

Act (Local) No II of 1901 *(Agra Tenancy Act), section* 201 *(3)—Suit for profits—Plaintiff a recorded co-sharer at date of suit—Effect of decision of Civil Court against plaintiff's title* post litem motam.

Where the decision of a suit in a Court of Revenue depends upon the determination of a question of title, the Court of Revenue is bound to follow the decision of a competent Civil Court on such question, even though that decision may have been come to while the suit in the Court of Revenue is in the stage of appeal. *Bhawani Singh* v. *Dilawar Khan* (2) followed.

THE facts of this case are fully stated in the judgment of RYVES, J.

Dr. *Surendra Nath Sen* and Babu *Surendra Nath Gupta*, for the appellants.

Babu *Saila Nath Mukerji*, for the respondent.

RYVES, J. :—Musammat Chatura Kunwar who was recorded in the khewat as a co-sharer brought the suit, out of which this appeal arises, under section 164 of the Agra Tenancy Act for her share of the profits for the years in suit against her deceased

* Second Appeal No. 1287 of 1919, from a decree of E H. Ashworth, District Judge of Cawnpore, dated the 3rd of April, 1919, confirming a decree of Inayat Husain, Assistant Collector, First Class of Cawnpore, dated the 15th of June, 1918.

(1) (1921) I. L. R., 43 All., 564. (2) (1909) I L R, 31 All., 253.

husband's brother, Baldeo Singh, the defendant appellant here. The main defence was that Lachhman Singh, the husband of Musammat Chatura Kunwar, was the brother of Baldeo Singh, defendant, and joint with him, that on the death of Lachhman Singh, Baldeo Singh had at the request of the plaintiff got her name entered in the revenue papers only for her consolation and that she had no proprietary right. The trial court refused to go into this question and gave the plaintiff a decree as her name was recorded in the khewat. The defendant appealed. During the pendency of the appeal the defendant filed a suit in the Civil Court and obtained a decree which declared that Musammat Chatura Kunwar was not a co-sharer. This decree was passed, it appears, on the strength of a compromise to which Musammat Chatura Kunwar was a party in a previous suit which was brought in 1899 for profits, in which she admitted that she was not a co-sharer and that her name was merely entered for maintenance and consolation. A copy of this decree was produced before the learned Judge of the lower appellate court. Thereupon he fixed two points for decision :—

(1) Was the lower court right in holding the plaintiff respondent to be a co-sharer and as such entitled to bring the suit ?

(2) If so, is this court nevertheless bound or entitled to upset the decision of the lower court on the ground that since the lower court's decree was passed the appellant has obtained a decree of a Civil Court declaring the respondent not to be a co-sharer ?

On the first point he held that the lower court was right in refusing to look at anything except the entries in the khewat, and on the second point, after considering two cases to which we shall presently refer, held that there was no ruling which went as far as to lay down that an appellate Revenue Court must pay regard to a declaration obtained after the decision of the case by the Revenue Court of first instance, and having come to the conclusion that at the time the Revenue Court had passed its decree the plaintiff was recorded a co-sharer, held that its decision was right. On appeal before us it has been argued that this case cannot be distinguished from the Full Bench case

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SURJAN SINGH v. CHATURA KUNWAR.

of *Bhawani Singh* v. *Dilawar Khan* (1). The only difference in the facts between that case and this lies in the circumstance that in that case an issue was remitted by the District Judge in whose court an appeal was pending. Before that issue could be decided, the defendant in that case brought a suit in the Civil Court for a declaration of his title and obtained a decree in his favour. He produced this decree before the Assistant Collector at the trial of the issue remanded to him, but that court refused to admit it in evidence. On appeal, although this decree was before the District Judge, he held that until the defendant had got the village records amended in his favour in accordance with that decree, no effect could be given to it in a suit of this nature, and that the defendants must pay profits according to the recorded shares as they then stood in the khewat. In principle it seems to me that that case cannot be distinguished from the present In that case it was held, following a previous decision of this Court in *Durga Shankar* v. *Gur Charan* (2), that when as between parties to a revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision, and this Court decreed the appeal and remanded the case. On behalf of the respondent before us it has been argued that the decision of the majority of the Judges in the Full Bench case of *Durga Prasad* v. *Hazari Singh* (3) virtually overruled the decision in *Bhawani Singh* v. *Dilawar Khan* (1). A previous decision of this Court was expressly dissented from, but the case of *Bhawani Singh* v. *Dilawar Khan* (1) was not expressly dissented from, and there are observations in the concluding part of the learned Chief Justice's judgment on page 807 and in the judgment of Mr. Justice Banerji on page 813 which would suggest that it was not the intention of the Court to dissent from it. The case of *Bhawani Singh* v. *Dilawar Khan* (1) has been considered since in *Hargu Lal* v. *Med Singh* (4). The actual facts of that case were somewhat different. There, while a similar suit was pending in the Revenue Court, the defendant not only got a

(1) (1909) I L. R., 31 All., 252.
(2) Weekly Notes, 1906, p. 1.
(3) (1911) I L. R., 33 All., 799
(4) (1915) 29 Indian Cases, 509.

Civil Court's decree declaring that the plaintiff was not entitled, but had got the revenue records corrected in accordance with the Civil Court's decree. Both lower courts dismissed the plaintiff's suit, which was, on appeal, decided by a Division Bench of this Court (BANERJI and RAFIQ, JJ.) The Full Bench case of *Durga Prasad* v. *Hazuri Singh* (1) was cited and it was argued that the Revenue Court should have decided the case on the entries in the revenue papers as they stood at the date of the suit. But the learned Judges relied on the case of *Bhawani Singh* v. *Dilawar Khan* (2) and held that that ruling governed the case then before them, and accordingly dismissed the appeal. Under these circumstances it seems to me that we are bound to hold that the case of *Bhawani Singh* v. *Dilawar Khan* (2) has not been overruled, and therefore must be applied in similar circumstances. I can see no ground for differentiating the facts of this case from the facts of that case, and that being so, it seems to me that we are bound by it. The result in my opinion is that this appeal must be allowed and the decree of the court below be set aside and the plaintiff's suit be dismissed in all courts with costs.

GOKUL PRASAD, J.:—I agree in the judgment of RYVES, J., and have nothing further to add except that in a case of this kind the order or decree of a Civil Court declaring the rights of the parties, if passed before the end of the litigation, must be followed. This is only consistent with the whole scheme of the Tenancy Act, according to which the Civil Court is the only court to decide questions of title, except in certain cases where the Revenue Courts are authorized to do so and are then to follow the procedure of Civil Courts, their decisions having the force of Civil Court decrees.

Appeal allowed.

(1) (1911) I. L. R., 33 All., 739. (2) (1909) I. L. R., 31 All., 253.

1921
December, 16

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

W. A. COLLARD (APPELLANT) *v.* MARIE AGNES COLLARD AND ANOTHER (RESPONDENTS) *

Divorce—Evidence—Proof of adultery in contested cases—Practice—Uncorroborated testimony of single witness—Nature of corroboration required.

The rule of practice prevailing in the Divorce Courts in England in contested cases is that the entirely uncorroborated evidence of one person is not taken to be sufficient to establish adultery *Evans* v *Evans* (1) and *Simmons* v *Simmons* (2) referred to.

Adultery can, however, be established by the entirely uncorroborated evidence of one witness as to the particular act, provided that there is evidence of a similar character in regard to other offences which can be and are treated as corroboration.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are fully stated in the judgment of MEARS, C. J.

Babu *B. B. Chandra* and Munshi *Surendra Nath Varma*, for the appellant.

Mr. *R. K. Sorabji* and Babu *Lalit Mohan Banerji*, for the respondents.

MEARS, C. J. :—These are appeals by the husband, the wife and the co-respondent in a matrimonial matter. On the 15th of November, 1920, the wife filed a petition against her husband alleging cruelty and adultery. She gave sufficient specific instances of cruelty to make that a complete charge if she had been able to support those instances by evidence. Her petition also alleged adultery with sufficient precision to enable that to be a complete charge. If the court had accepted the charges of cruelty and adultery she would have been entitled to her decree. The defence of the husband was a complete denial of those charges.

In the husband's answer of the 13th of December, 1920, he set up not very clearly defined allegations, but said that he had evidence with which he could prove that his wife, the petitioner, had committed adultery with Mr. Dutton; but he said he did not wish to press the charge, and he attributed the divorce proceedings to Mr. Dutton.

* Appeal No. 44 of 1921, under section 10 of the Letters Patent.

(1) (1844) 1 Robert., 165 (2) (1847) 1 Robert., 566;

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The hearing of the wife's petition was commenced on the 7th of January, 1921, and on the 7th and 8th of January, the wife's evidence, that of Mr. Dutton and that of Mr. Collard were taken; and then it appeared that the charges of cruelty rested almost, if not entirely, upon the uncorroborated evidence of the lady; and that the charges of adultery, as to the details of which the lady herself had no first-hand knowledge, had been supplied to her by Mr. Dutton. Mr. Collard then asked to be allowed to file a cross petition, and there was some argument as to whether he could be allowed to take this course because he had in court definitely withdrawn any imputation of misconduct against his wife. In the very singular circumstances of the case he urged that he should be allowed to file a cross petition, because all these charges of adultery were made against him by a man who was, as he contended, the lover of his wife. The Court allowed the cross petition to be put upon the file and gave 15 days for the wife, who in that petition had become the respondent, and the co-respondent to file their answers. They were duly filed and then the hearings proceeded.

Mr. Justice WALSH came to the conclusion on the petition of the wife that she had failed to establish her allegation of cruelty. He thought Mr. Collard very likely was not an ideal husband. He thought Mr. Collard at times lost his temper. I read Mr. Justice WALSH'S judgment as inclining to the belief in his own mind that at times Mr. Collard may have treated his wife with some degree of roughness. But the evidence of cruelty which was denied by Mr. Collard, remained entirely uncorroborated by anybody. No witness was called except Mr. Dutton who spoke to his having been present once when Mr. Collard was rude to his wife. No other living person was called to support Mrs. Collard's story, and, therefore, Mr. Justice WALSH felt constrained to dismiss that part of her petition.

On the question as to whether Mr. Collard had been guilty of adultery he came to a conclusion adverse to him. That conclusion would not entitle the wife to anything more than a judicial separation; but it had, as it happened, in view of the cross petition, the very important result of operating as a discretionary bar when the husband's cross petition came up for consideration.

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The incidents of adultery which are alleged against Mr. Collard rest upon the evidence of Mr. Dutton, of a man named Anwar Khan and another man named Kallan. Mr. Justice WALSH saw all these three persons in the witness-box and he believed the evidence which Dutton gave, but he totally disbelieved the evidence of Anwar Khan and Kallan. That being so, it will be seen at once that he convicted Mr. Collard of adultery upon the uncorroborated testimony of one witness. We are by no means prepared to say that we disagree with Mr. Justice WALSH when he says that he thinks Mr. Collard was guilty of infidelity to his wife. But the matter is very different when we have to consider whether there has been presented to the Court that degree of proof which prudent and cautious men must demand when they have to approach so serious a matter as divorce. We have referred Mr. *Sorabji* to what we believe to be the rule of practice prevailing in the Divorce Court in England in contested cases, namely, that the entirely uncorroborated evidence of one person is not taken to be sufficient to establish adultery. And though the cases which are cited in support of this, namely *Evans* v. *Evans* (1) and *Simmons* v. *Simmons* (2) are old cases, we do feel that we ought not to act upon the uncorroborated evidence of Mr. Dutton whom we believe, as appears hereafter, to have committed adultery with Mrs. Collard. Adultery can be established by the entirely uncorroborated evidence of the particular act, provided you bring in evidence of a similar character in regard to other offences which can be and are treated as corroboration. Take, for instance, the only case here in which there is any suggestion of corroboration. The allegation is that Mr. Collard admitted to his then intimate friend that he had crept past his wife's bed one night and had connection with a punkha coolie woman. It is agreed that, if this took place, Zainab was the name of the woman. In support of that Anwar Khan speaks to visits which he says he saw Mr. Collard pay to that punkha coolie woman's house. Kallan says that he saw Mr. Collard and the punkha coolie woman between 4 and 5 p. m. in the afternoon walking about and sitting down in his grove, which has a pathway across it, and is frequented

(1) (1844) 1 Robert., 165 (2) (1847) 1 Robert., 566.

by many people, and that he saw this happen not once but many times. Now if we believed the evidence of Anwar Khan and Kallan that would be sufficient corroboration. It is not corroboration of a particular act of adultery, but it leads to the inference that the story of the adultery is true if the evidence of Anwar Khan and Kallan were accepted. In the same way, Mr. Dutton alleged that he accompanied Mr. Collard to Mirpur bazar and that Mr. Collard went into a brothel and having remained there some little time returned, saying that he had seen a favourite girl of his. That is an absolutely uncorroborated incident. But even if one person, who was credible to the Court, had come forward and said:—"I know that girl, I know where she lives and I have seen Mr. Collard going into that house", that would be corroboration which would be sufficient to establish the allegation. But when all this evidence is analysed, bearing in mind particularly the rejection of Anwar Khan's evidence and that of Kallan's by the Judge, we are left with nothing but these statements of Mr. Dutton; and that being so, we have to hold, as a matter of practice under the rule which we consider to be a good one and which is spoken of in the cases which we have referred to Mr. *Sorabji*, that the uncorroborated evidence of one witness, even though believed, must not be acted upon so as to establish adultery either in man or woman. In that view of the matter we must overset the finding against Mr. Collard that he did, on the occasions alleged, commit adultery. That being so, the position stands that Mr. Collard is entitled to have whatever relief this Court may think he should have upon his cross petition. The charge made by Mr. Collard in his petition was reduced to an allegation that on the 25th, 26th, and 27th of July, 1919, Mrs. Collard and Mr. Dutton came to Allahabad and stayed for 2½ days in the Kenilworth Boarding House.

[The judgment then proceeded to discuss the evidence and it was held that the allegation of adultery against Mrs. Collard was established.]

That being so, the petition of the husband is a well-founded petition, and that part of Mr. Justice WALSH'S judgment must be confirmed.

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Mr. *Chandra* has said that his client Mr. Collard is not desirous of making money out of his wife, and, therefore, he voluntarily abandoned any claim to the damages for Rs. 1,000 which Mr. Justice WALSH awarded against Mr. Dutton. In the circumstances we are of opinion that that is a proper thing for Mr. Collard to have done, because Mr. Dutton's point that these two parties, husband and wife, had got very much apart before Dutton became on terms of close friendship with Mrs Collard seems well founded.

The result, therefore, is that the wife's petition fails both on the ground of cruelty and adultery. The husband's petition succeeds on the ground of adultery, and, therefore, we grant to the husband a decree *nisi* for the dissolution of his marriage on the ground of his wife's misconduct with the co-respondent. In view of Mr. Collard's withdrawal of any claim to the damages which were assessed by Mr. Justice WALSH at Rs. 1,000, we rescind that part of the Judge's order. The costs of all parties in both suits and in this appeal must be borne by the co-respondent. The costs which Mr. Dutton will have to pay for both the hearings, including counsel's fees and all other matters, are to be taken to be Rs. 1,100. We allow Mr. Dutton two months from this date to pay this amount.

BANERJI, J.—I concur.

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December, 16.

Before Mr Justice Piggott and Mr. Justice Walsh.

LACHHMAN DAS (JUDGMENT-DEBTOR), *v.* BABA RAMNATH KALIKAMLI-WALA (DECREE-HOLDER).*

Civil Procedure Code (1908), *Order XXI, rule* 2 (2)—*Act No.* I *of* 1872 (*Indian Evidence Act*), *section* 92—*Execution of decree—Adjustment of decree out of court—Oral executory contract set up by the judgment-debtor as a bar to execution.*

The holder of a decree payable by instalments applied for execution of the decree by arrest of the judgment-debtor alleging that nothing had been paid towards satisfaction of the decree. The judgment-debtor thereupon filed a petition alleging that the question of the execution of the decree had been settled out of court by means of an agreement between the parties under which the judgment-debtor was to make a present payment to the decree-holder and further to convey to him certain items of immovable property. The decree-holder denied that any such adjustment as alleged had taken place, and the

* First Appeal No. 54 of 1921, from a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 5th of January 1921.

judgment-debtor was unable to show that any part of the alleged agreement which, according to his own account of it, was to be performed by him, had been so performed.

Held that such an agreement as alleged could not be set up by the judgment-debtor under rule 2 of order XXI of the Code of Civil Procedure as a bar to execution.

Held further, by Walsh, J., that section 92 of the Indian Evidence Act, 1872, was also a bar to the setting up of such an oral agreement substituting a new executory contract in place of the original decree.

THE facts of this case are fully set out in the judgment of PIGGOTT, J.

The question at issue was whether an execution court on an application by the judgment-debtor under order XXI, rule 2 (2), of the Code of Civil Procedure, should record as a certified adjustment of the decree an alleged executory contract of adjustment where the factum of the adjustment was denied by the decree-holder and the judgment-debtor had not performed his part of the contract prior to his application in court.

Dr. *Surendra Nath Sen* (with Babu *Surendra Nath Gupta*) for the appellant, contended that a mere denial of an adjustment by the decree-holder was not enough and did not amount to "showing cause," and cited—*Arjan Singh* v. *Harcharan Singh* (1), *Champa Lal* v. *Mahesh Sitla Bakhsh Singh* (2), *Runglal* v. *Hem Narain Gir* (3), *Muhammad Kasim* v. *Rukia Begam* (4), and *Shaik Davud Rowther* v. *Paramasami Pillai* (5).

He, however, conceded that this did not shift the burden of proof, and the adjustment when denied must, in the first instance, be proved by the judgment-debtor. He contended that an inquiry should have been made by the execution court and the adjustment, if proved, recorded as certified.

Munshi *Durga Prasad*, for the respondent:—

Order XXI, rule 2 (2), Civil Procedure Code, contemplates an actual completed adjustment *to the satisfaction of the decree-holder* and not a mere inchoate or incomplete agreement to adjust. It would lead to interminable confusion if execution courts were permitted to inquire into the existence of an unsigned agreement denied by one party, and in the result refuse execution of the decree

(1) Weekly Notes, 1884, p. 40. (3) (1885) I. L. R., 11 Calc., 166.
(2) Weekly Notes, 1888, p. 82. (4) (1919) I. L. R., 41 All., 448.
(5) (1916) 31 M. L. J., 297.

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and virtually give an order for specific performance of a new contract of adjustment. This is improper and could only be carried through by a subsequent regular suit, and such a procedure is clearly beyond the bounds of an inquiry under order XXI, rule 2 (2).

Here also the judgment-debtor is out of court as he had admittedly failed to carry out his part of the alleged contract.

He cited *Tirumalai Kandama* v. *The Eastern Development Corporation* (1).

Dr. *Surendra Nath Sen*, in reply, contended that an executory contract must be recorded by the execution court, once the factum of an adjustment on such a basis is found in the judgment-debtor's favour, and asked that he might be allowed to complete his part of the contract now.

PIGGOTT, J.:—This is a judgment debtor's appeal in an execution case and it comes before us under the following circumstances. The decree in question is one passed on the 14th of February, 1920 It has some bearing on the equities of the case, though not on its legal aspects, that this was a compromise decree under which the judgment-debtor was at liberty to satisfy it by easy instalments. There was, however, a provision that, on default being made in respect of two consecutive instalments, execution could be taken out for the entire amount. The decree-holder on the 23rd of June, 1920, applied to the court which had passed the decree for execution of the same according to its terms, alleging that no instalment had ever been paid, and at the same time asked to have the decree transferred to the Civil Court at Saharanpur within whose jurisdiction the judgment debtor resided. On the 2nd of July, 1920, he applied for execution of his decree by arrest of the person of the judgment-debtor. The record before us does not explain why he failed to obtain execution in the manner asked for The court remained open until the 24th of September, 1920, when it closed for annual vacation. It re-opened on the 25th of October, 1920, and on that date the judgment-debtor himself came into court. He presented a petition, the precise terms of which will require to be further examined, but which purported to be under the second

(1) (1917) 42 Indian Cases, 597.

clause of order XXI, rule 2, of the Code of Civil Procedure, and asked the court to issue notice to the decree-holder to show cause why the adjustment of the decree should not be recorded. The decree-holder presented himself in court on the 4th of December, 1920, denied all the allegations of fact contained in the judgment-debtor's petition and alleged that there had been no payment made out of court under the decree and no adjustment of the decree, in whole or in part, to his satisfaction. The judgment debtor desired to tender evidence in proof of certain facts set forth in his application. The court refused to hear him and recorded a brief order to the effect that the adjustment alleged by the judgment-debtor not being certified by the decree-holder, the execution court had no jurisdiction to inquire into the alleged adjustment. It accordingly disallowed or rejected the judgment-debtor's petition. The court was no doubt referring to the provisions of the third clause of order XXI, rule 2. The appeal before us is against this order. The learned Subordinate Judge was either under a misapprehension of fact, or under a misapprehension of law, when he passed his order in the particular form in which he did. He may have thought that the judgment-debtor's petition of the 25th of October, 1920, was beyond time as a petition under order XXI, rule 2, clause (2) of the Code of Civil Procedure and that, therefore, no possible question could arise of a payment duly certified to the court, when once the decree-holder declined to certify such payment. On the other hand, he may have thought that the decree-holder had shown sufficient cause, in any event, against the alleged adjustment being recorded when he denied that any adjustment had taken place. As a matter of fact, by reason of the court being closed during the vacation, the judgment-debtor's application was within time as an application under the second clause of order XXI, rule 2, of the Code of Civil Procedure, and there is very good authority for the proposition that the decree-holder, when brought into court by such an application, must show good cause why it should not be granted. *Primâ facie* the decree-holder showed good cause when he denied that there had been any satisfaction or adjustment of the decree; but ordinarily a judgment-debtor would be permitted in such circumstances to produce

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evidence with a view to satisfying the court that the decree-holder was not speaking the truth and that the decree had, as a matter of fact, been paid up or otherwise adjusted, in whole or in part. In the present case, however, the decree-holder was in a much stronger position, and although the order of the court below cannot be sustained on the precise ground on which it apparently proceeds, it was a correct order under the circumstances. What has been pointed out to us on behalf of the respondent is this, that, on the appellant's own showing, the decree had not been adjusted, in whole or in part, to the satisfaction of the decree-holder on the 25th of October, 1920, when the judgment-debtor's petition was presented to the court. What the judgment-debtor alleges to have taken place is somewhat as follows. On the day after the arrest of the judgment-debtor had been applied for, there was a meeting of the parties concerned, in the presence of members of the brotherhood, and an oral agreement was reached. That agreement was to the effect that the decree-holder would accept satisfaction of his decree in a modified form and would abandon the execution proceedings which were being taken, as soon as four specified conditions had been fulfilled by the judgment-debtor. One of these was a cash payment of Rs. 1,000. Another was the execution in favour of the decree-holder of a sale-deed conveying to him a certain enclosure in the town of Deoband valued at Rs. 5,600. The next was the execution by the judgment-debtor of a deed transferring to the decree-holder all his own rights under a certain mortgage of the 8th of March, 1908. Finally, the judgment-debtor was to execute yet another sale-deed, conveying certain land in the village of Rankhandi to the decree-holder, which land was alleged to be worth Rs. 4,500. Now, it is admitted that up to the 25th of October, 1920, and indeed up to the present day, the judgment-debtor has not done any of the things which according to his petition he had covenanted to do. It cannot be said that this petition explains in any way his own failure to execute the documents which he says he had bound himself to execute. Beyond all question there had been no adjustment of the decree to the satisfaction of the decree-holder, and there has been none to this day. The order of the court below was, therefore, perfectly correct. We have been

asked to go further into the matter and to consider what the position would be if the judgment-debtor were now to set to work to perform his part of the alleged oral contract. I do not think it is necessary for us to do this: it seems to me fairly clear that an oral agreement, not as yet performed by either party, could not successfully be set up so as to prevent a decree-holder from proceeding with the execution of his decree. On the facts stated in the judgment-debtor's own petition, the decree-holder had not bound himself by anything more than an oral agreement; whether it was or was not open to him to reconsider his position, whether he was not justified in doing so by facts ascertained by him subsequently to the date of the alleged oral agreement,—these and similar questions might arise, if this were a suit for specific performance of the alleged oral agreement of the 3rd of July, 1920, or a claim for damages against the decree-holder for having refused to abide by that agreement. I think the court below was right in holding that such matters could not be inquired into by an execution court, which could not conceivably substitute a different decree for the one which it was called upon to execute, or give the decree-holder in place of the decree under execution some sort of a decree for specific performance of a contract orally entered into. Under the circumstances of this case, therefore, I am quite satisfied that the order of the court below was right and that this appeal must fail. I would dismiss the appeal with costs.

WALSH, J.:—I entirely agree that the appeal fails. I agree also that the learned judge in the court below did not put his finger really upon the weak spot in the judgment-debtor's application. As at present advised I do not think the absence of a certificate by the decree-holder is necessarily a bar to an inquiry into the facts where a real adjustment is alleged. In my opinion sub-section (2) of rule 2 of order XXI enables a judgment-debtor to force the decree-holder into court and, if he has proper materials, to call upon him to show cause why an alleged adjustment should not be recorded as certified. I am personally indebted to the argument of Mr. *Durga Prasad* on behalf of the respondent in this case. It seems to me that he has put the real objections to the judgment-debtor's contention on the right ground. I will

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confine myself to the main point he argued, by quoting a dictum which he cited from one of the unauthorized reports which puts the matter as clearly as it can be put. I agree with Mr. *Durga Prasad's* contention that this application was in substance a suit for specific performance, and the dictum which I adopt is as follows:—"An inchoate contract, which if completed would bar execution of a decree, cannot be pleaded as a bar to execution under order XXI, rule 2, and the judgment-debtor cannot claim that the contract should be completed and then be invoked in bar of execution."

There is another ground, based upon the general law, upon which I think the judgment-debtor's application was bound to fail By his own showing he was setting up a verbal agreement by the decree-holder to accept some variation, or, as it may also be put, some new contract in substitution of the original decree, which was still in the executory stage, and he proposed to prove that agreement by verbal evidence. According to paragraph 1 (*b*) of his application he alleged a mutual agreement made before members of the brotherhood and respectable persons by which it was settled that (1) a sale-deed should be executed, (2) that cash should be paid. To my mind that allegation offends against section 92 of the Evidence Act which provides as follows:—"When the terms of any contract, etc., etc., or any matter required by law to be reduced to the form of a document have been proved, etc., no evidence of any oral agreement or statement shall be admitted, as between the parties or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms." A new agreement is clearly a matter contradicting or varying the terms of the original decree. Proviso 4 makes the matter even clearer. There can be no question that a decree is a matter required by law to be reduced to the form of a document. Appendix D to the Code of Civil Procedure contains statutary forms for decrees, which must be in writing and must accord with the judgment, which is also to be in writing. I agree with my brother that, strictly speaking, it is not necessary to decide this question. On the other hand, it does arise on the appellant's own showing in the court below and would in my judgment have been sufficient ground for dismissing

his application *in toto*. It follows that any further attempt to set up this alleged agreement, through any effort which the appellant may hereafter make to repair his own omission, ought to fail unless supported by an agreement in writing signed by the decree-holder.

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I agree with the order passed by my brother.

BY THE COURT:—We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1921. *December*, 16.

Before Mr. Justice Stuart.

EMPEROR v SUKHNANDAN SINGH AND ANOTHER.*

Act No. III of 1867 (Public Gambling Act), section 13—Public place—Grove to which public commonly have access in fact, although it is the subject of private ownership.

A place to which the public have access, without their access being refused or interfered with, is a public place, within the meaning of Act No. III of 1867, whether the public have a right to go there or not. *Queen Empress* v. *Sri Lal* (1) followed. *Queen* v. *Wellard* (2) referred to *Ahmad Ali* v. *King-Emperor* (3) distinguished.

THIS was an application in revision from an order convicting the applicants of an offence under the Public Gambling Act, 1867. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

STUART, J.:—The only point raised in this revision is whether the applicants were gambling in a public place. On the finding of the Magistrate who tried the case, they were found gambling in the area occupied by a large grove. At one end of the grove is the shrine of a goddess and a tank. A fair was in progress at the time that they were gambling and visitors to the fair had penetrated to all parts of the grove. The grove is private property, but on the occasion of the fair the public use the grove

* Criminal Revision No 643 of 1921, from an order of E. T. Thurston, Sessions Judge of Cawnpore, dated the 21st of June, 1921.

(1) (1895) I. L. R., 17 All., 166 (2) (1884) L. R., 14 Q. B. D., 63.

(3) (1904) 1 A. L. J., 129.

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and there is no interference with their so doing. The decision in the case of *Ahmad Ali* v. *King-Emperor* (1) is not in point, because the grove used for the purpose of gambling in that case was a private grove to which the public did not have access. The question as to whether the grove in this case was or was not a public place presents little difficulty. When the public have access to a place, without their access being refused or interfered with, that place is a public place whether the public have a right to go there or not. Authority for this proposition will be found in *Queen* v. *Wellard* (2). Lord COLERIDGE laid down there that a place was a public place if the public were in the habit of resorting to it and no one prevented them from so doing. GROVE, J., laid down that a public place is one where the public go, no matter whether they have a right to go or not. This view was accepted in the case of *Queen Empress* v. *Sri Lal* (3). EDGE, C. J., laid down that a public place was a place to which the public had by right or by permission or by usage or otherwise, access. I, therefore, find that the applicants were gambling in a public place and they were rightly convicted. I dismiss this application.

Application dismissed.

FULL BENCH.

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January, 3.

Before Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Lindsay.

SITA RAM (DECREE-HOLDER) *v.* JANKI RAM (JUDGMENT-DEBTOR).*

Civil Procedure Code (1908), Order XXI, rules 71 and 84—Execution of decree—Failure of auction purchaser to make deposit of 25 per cent.—Property re-sold next morning—"Forthwith"—Order against defaulting purchaser to make good deficiency of price on re-sale—Appeal—"Decree."

The highest bidder at an auction sale in execution of a decree failed to deposit the 25 per cent. of the purchase money which he was required by law to deposit on the spot. In consequence of this the property for sale was re-sold, and, as the first sale had taken place some what late in the day, the re-sale was held the following morning. The property realized a much lower price on the re-sale than it had at first, and the judgment-debtor applied for

* First Appeal No. 94 of 1921, from an order of J. Allsop, District Judge of Ghazipur, dated the 13th of April, 1921.

(1) (1904) I A. L. J., 149. (2) (1884) L. R., 14 Q. B. D., 63.
(3) (1895) I. L. R., 17 All., 166.

an order against the first purchaser to make good the deficiency,—which he obtained.

Held that the re-sale had been held "forthwith" within the meaning of order XXI, rule 84, of the Code of Civil Procedure, and the order was a good one. It was not necessary as a condition precedent to the making of such an order that the highest bidder should have made the deposit required. *Amir Begam* v. *The Bank of Upper India, Ltd.* (1) not followed.

Held also, that the order was appealable. *Ram Dial* v. *Ram Das* (2) approved. *Deoki Nandan Rai* v. *Tapasri Lal* (3) overruled.

THE facts of this case were, briefly, as follows:—

Certain house property of the respondent was put up for sale in execution of a Civil Court decree. In the execution sale the present appellant was one of the bidders and having made the highest bid of Rs. 5,050, he was declared to be the purchaser. But he failed to pay the deposit of 25 per cent. of the purchase-money required by order XXI, rule 84 (1), of the Code of Civil Procedure. As it was late, the officer conducting the sale announced that the property would be re-sold next morning, and it was so re-sold. On the second sale the property fetched only Rs. 2,850. This was more than the decretal amount, so that the decree was satisfied.

Subsequently the judgment-debtor (the present respondent) applied to the court under order XXI, rule 71, of the Code of Civil Procedure to make the appellant liable for the deficiency of price which happened on the re-sale by reason of the appellant's default.

The court of first instance dismissed the application of the judgment-debtor on the ground that there had not been a re-sale "forthwith."

On appeal the District Judge held that the re-sale had taken place "forthwith" within the meaning of the rule and remanded the case under order XLI, rule 23, of the Code of Civil Procedure for the determination of the other questions involved and the disposal of the case on the merits.

From this order of remand the defaulting purchaser preferred this appeal.

Babu *S. C. Das* (for Babu *Sital Prasad Ghosh*) for the appellant:—

There are two submissions to be made. Firstly, no appeal lay to the lower appellate court, so that the decision of the Munsif

(1) (1908) I. L. R., 30 All., 378. (2) (1876) I. L. R., 1 All., 181.
(3) (1892) I. L. R., 14 All., 201.

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was final. A right of appeal must be provided for by Statute. There is no inherent power in any court to confer on a party this right. In the Code of Civil Procedure there is no specific provision for an appeal from the decision in a proceeding under order XXI, rule 71. Nor does this decision amount to a "decree," in which case the appeal could certainly lie. Section 2 (2) of the Code defines "decree." There being no "suit" the adjudication in the present case could not be said to be a "decree." A comparison between section 145 of the Code and rule 71 of order XXI will suggest that if the Legislature had intended to allow a right of appeal in the latter case, it would have expressly mentioned it. The judgment-debtor had an alternative remedy by "suit" for this deficiency. From a decree in such suit the aggrieved party could appeal. *Amir Begam* v. *The Bank of Upper India, Limited* (1), and *Kameshwar Narain Singh* v *Musammat Harbans Babui* (2). In the Allahabad case a suit was actually brought. The leading case in my favour is the Full Bench case of *Deoki Nandan Rai* v *Tapesri Lal* (3). Secondly, when the appellant failed to make the deposit of 25 per cent. of the purchase-money he did not become liable to pay the deficiency on the second sale, as there was no re-sale "forthwith" as contemplated by the rules.

Rules 69, 71 and 84 of order XXI contemplate cases in which some additional expenses are incurred after the first sale falls through. There being no deposit of 25 per cent. there was no sale to the appellant. *Amir Begam* v. *The Bank of Upper India, Limited* (1) and *Ajoodhya Persad* v. *Gopal Dutt Misser* (4).

Dr. *M. L. Agarwala* and Munshi *Kamla Kant Varma*, for the respondent:

The closing words of order XXI, rule 71, have to be considered. The whole proceeding that follows upon an application under that rule is to be treated as if it were a proceeding in execution of a decree. Hence an appeal lies. As regards the comparison between section 145 and rule 71 of order XXI, a surety being always a stranger, it was necessary to introduce express words about a right of appeal. But the purchaser is not

(1) (1908) I. L. R., 30 All., 278

(2) (1919) 50 Indian Cases, 53.

(3) (1892) I. L. R., 14 All, 201.

(4) (1872) 17 W. R. C. R., 271.

always a stranger. A decree-holder may purchase in an auction sale. It has been held by the earliest Full Bench in this Court, *Ram Dial* v. *Ram Das* (1), that an appeal lies from an order passed on an application to make a defaulting purchaser liable for the loss occasioned by a re-sale. In *Deoki Nandan Rai* v. *Tapesri Lal* (2), it is to be borne in mind that the appellant being the defaulter the sympathy of the court was against him.

The following cases were also referred to: *Amir Baksh Sahib* v. *Venkatachala Mudali*(3) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (4).

Babu *S. C. Das* in reply:—

The closing words of rule 71, order XXI, only lay down the manner in which the proceeding is to be conducted. They do not confer a right of appeal.

PIGGOTT, WALSH and LINDSAY, JJ.:—The case before us, whether it be described as a first appeal from order or as an application in revision, arises under the following circumstances:—

Janki Ram and others were the judgment-debtors under a certain decree. Certain house property, belonging either to Janki Ram or to all the judgment-debtors, was taken in execution of the decree and put up for sale. One Sita Ram took part in the auction sale and bid up to a sum of Rs. 5,060. This being the highest bid offered, it was accepted by the sale officer. Sita Ram then failed to make the deposit of 25 per cent. of the purchase-money which he was required to make by the rules. It being then late in the day the sale officer informed all the parties concerned, including any other bidders who were present at the time, that he would put up the property for sale again on the following morning. He did so, and that same property was purchased for a sum of Rs. 2,850. This was more than sufficient to satisfy the decree, so that the decree-holder ceased to have any further interest in the matter. Janki Ram subsequently applied to the court to make Sita Ram liable for the difference in price between the sum of Rs. 5,060 bid by him and the sum of Rs. 2,850 eventually realized at the sale which

(1) (1876) I. L. R., 1 All., 181. (3) (1895) I. L. R., 18 Mad., 489.

(2) (1892) I. L. R., 14 All., 201. (4) (1897) I. L. R., 25 Calc., 99.

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took place on the second morning. There has been some argument regarding the precise form of the application made by Janki Ram to the court, but no substantial question turns upon this. In effect Janki Ram asked the court to enforce in his favour the right recognized by order XXI, rule 71, of the Code of Civil Procedure. Sita Ram entered an appearance and raised a number of objections. One was to the effect that Janki Ram alone was not entitled to maintain such an application without the concurrence of the other persons who had been judgment-debtors along with him. Another point taken was that the re-sale had not taken place " forthwith " within the meaning of order XXI, rule 84, of the Code. There had also been a claim on the part of Janki Ram for interest on the deficiency and his right to claim interest was contested by Sita Ram. A point was also taken that the application was not maintainable at all because there had been no certificate by the sale officer. The court before which this application was made dealt with two of the points raised only. It held, on the strength of a reported decision of this Court, that the absence of a formal certificate did not make Janki Ram's application any the less maintainable. It would seem that, whether or not there was any formal certificate, the sale officer did report to the court the fact that there had been a sale at which Sita Ram had bid up to the sum of Rs. 5,060 and a subsequent sale at which the price realized was only Rs. 2,850. There does not seem to be any substance in this objection. The questions raised regarding Janki Ram's right to maintain the application without the concurrence of the other judgment-debtors and with regard to the claim for interest were not determined at all. The court held, however that there had not been a re-sale " forthwith," as required by the rule, and on this ground alone proceeded to dismiss Janki Ram's application. The latter appealed to the District Judge. In that court two questions were argued and determined. The District Judge held that the re-sale had taken place " forthwith " within the meaning of the rule. He was, however, faced with a further argument based upon a decision of this Court, *Amir Begam* v. *The Bank of Upper India, Limited* (1). It was there held that, under the analogous

(1) (1908) I. L. R., 30 All., 273.

provisions of the Code of Civil Procedure of 1882, a second auction sale held by reason of a former purchaser's failure to make the prescribed deposit was not a "re-sale" within the meaning of section 293 of that Code, corresponding with order XXI, rule 71, of Act No. V of 1908, and that consequently neither the decree-holder nor the judgment-debtor had any remedy against a purchaser who made no deposit at all. In effect this Court limited the application of that rule to cases in which a purchaser, after making the 25 per cent. deposit, failed to pay the balance of the purchase-money. It has been pointed out to us in argument that the view taken by this Court has not been accepted by the High Courts of Calcutta, Madras or Bombay, but we do not propose to discuss the state of the law as it stood under the Code of 1882. We agree with the learned District Judge that the position is changed by reason of an alteration made in order XXI, rule 84, of the present Code. Section 306 of the Code of 1882 provided that in default of the required deposit of 25 per cent. "the property shall forthwith be put up again and sold." In order XXI, rule 84, of the present Code the words are: "in default of such deposit the property shall forthwith be re-sold." It seems to us that the only possible reason for this change in the wording of the Code was to affirm the law in the sense in which it had been interpreted by other High Courts, as against the decision of this Court in *Amir Begam* v. *The Bank of Upper India, Limited* (1). As the Code now stands, the opening words of order XXI, rule 71, namely, "any deficiency of price which may happen on a re-sale by reason of the purchaser's default," are obviously wide enough to cover a default both in the making of the original deposit and in the subsequent payment of the balance due. We think, therefore, that the ruling in *Amir Begam* v. *The Bank of Upper India, Limited* (1), whether that case was rightly or wrongly decided on the law as it then stood, is no longer applicable to the law as defined in the present Code of Civil Procedure. This was the view taken by the learned District Judge in the present case. He, consequently, overruled the decision of the first court on the one ground upon which that court had proceeded in rejecting

(1) (1908) I. L. R., 30 All., 273.

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the application of Janki Ram. As there remained other matters for determination, he passed an order of remand under order XLI, rule 23, of the Code of Civil Procedure, sending the case back to the first court in order that the matter might be disposed of on the merits.

Sita Ram has brought the matter before this Court. He does not seem to have raised any question in the court below as to the right of the District Judge to entertain the appeal made to him by the judgment debtor Janki Ram. In this Court he desires to raise the contention that no appeal lay from the decision of the first court, that of the Munsif of Rasra. In order to avoid any technical difficulty in the way of his raising this contention, he has described his application to this Court both as a first appeal from order and as an application in revision. If his contention is sound as to the absence of any right of appeal, then the learned District Judge in entertaining the appeal was exercising a jurisdiction not vested in him by law. We have thought it proper, therefore, to allow this question to be raised before us and to be argued out, although the point was not taken in the court below. Treating Sita Ram as an appellant in an ordinary first appeal from order, we may say that he has one decision in his favour, and that a decision by a Full Bench of this Court. The case in question is that of *Deoki Nandan Rai* v. *Tapeeri Lal* (1). The decision was by a majority of three Judges out of four constituting the Full Bench, and one of the learned Judges who formed the majority concurred with the other two upon grounds which scarcely touched the main question in controversy. That decision expressly overruled a previous Full Bench decision of this Court in the case of *Ram Dial* v. *Ram Das* (2). It has since been considered by two other High Courts in India and expressly dissented from, vide *Amir Bakeh Sahib* v. *Venkatachala Mudali* (3) and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (4). It seems to us also that in the Bombay High Court the view that an appeal lies in such cases as the present has been adopted without any question. It was assumed that both an appeal and a second appeal did lie in

(1) (1892) I. L. R., 14 All., 201.
(2) (1876) I. L. R., 1 All. 181.
(3) (1895) I. L. R., 18 Mad., 489
(4) (1897) I. L. R., 25 Calc., 99.

the reported case of *Gangadas Dayabhai* v. *Bai Suraj* (1). In order, therefore, that the decision of this Court in *Deoki Nandan Rai* v. *Tapesri Lal* (2) might be further considered, this appeal was referred to a Full Bench of three Judges for consideration. We have come to the conclusion that the older decision of this Court was correct and that there is no adequate reason why this Court should continue, upon this question, to dissent from the view taken by the High Courts in Calcutta, Madras and Bombay. The reasons in favour of the view that an appeal lies can scarcely be stated better than they were by the learned Judges who pronounced the decision of this Court in *Ram Dial* v. *Ram Das* (3). Dealing with the analogous provisions of the Code of Civil Procedure of 1859, as amended by Act No. XXIII of 1861, the learned Judges held that there seemed no real difficulty about applying the rules governing executions of decrees, *mutatis mutandis*, to any proceeding taken against the defaulting purchaser, whether at the instance of the original decree-holder or of the judgment-debtor. They went on to say:—"The judgment-debtor and (if his claim be not satisfied out of the proceeds of the re-sale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default. The defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has passed. They are parties to the proceeding which is substituted for the suit . . . and the rule relating to appeals must be applied, *mutatis mutandis*, equally with any other of the rules governing executions of decrees." In effect the view taken was that the adjudication, in a case like the present, between the judgment-debtor and the defaulting purchaser, amounts to a decree and that appeals lie under the provisions governing regular appeals from decrees. The position does not seem to be altered by any changes which have since been made in the law; if anything, the case in favour of the maintainability of an appeal is made a little stronger by the definition of the word "decree" in the Code of 1908, where it is expressly made to include the determination of any question

(1) (1911) I. L. R., 36 Bom., 329. (2) (1892) I. L. R., 14 All., 201

(3) (1876) I. L. R., 1 All., 181.

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within section 47 or section 144 of the said Code. In *Amir Baksh Sahib* v. *Venkatachala Mudali* (1) the learned Judges of the Madras High Court virtually based their decision upon the same line of reasoning, and it seems to us correct. We are of opinion, therefore, that an appeal lay to the learned District Judge in this case and that his decision on the points determined by him was correct. The order of remand was, therefore, justified under the circumstances, and it will be for the court of first instance finally and completely to determine as between the parties all the points raised by the application of Janki Ram and the objections preferred thereto on the part of Sita Ram.

We dismiss this appeal with costs.

WALSH, J.:—I entirely agree. If I were free so to hold I should hold that a suit was expressly excluded by the provisions of order XXI, rule 71. I am unable to frame, satisfactorily to my own mind, any cause of action as between a judgment-debtor and a defaulting purchaser. There is certainly no contractual relationship upon which a suit can be founded, and I am unable to see what the cause of action really is or could be. To suggest that it was intended by this rule to provide machinery for passing an order to meet the justice of the case which any party could immediately afterwards bring a suit to set aside, seems to me to pay rather an extravagant compliment to the subtlety of the compilers of the Code.

Appeal dismissed.

APPELLATE CIVIL.

1922

January, 8.

Before Mr. Justice Piggott and Mr. Justice Walsh

MUHAMMAD MUBARAK HUSAIN AND ANOTHER (OBJECTORS) *v.* SAHU BIMAL PRASAD (DECREE-HOLDER)*

Civil Procedure Code (1908), *order XXI, rule 57—Execution of decree—Order dismissing application "for the present" but maintaining attachment—Fresh attachment not necessary.*

By reason of the default of the decree-holder the court was unable to proceed with the execution of the decree and passed the following order:—"The execu-

* First Appeal No. 88 of 1921, from a decree of Kshirod Gopal Banerji, Subordinate Judge of Moradabad, dated the 15th of January, 1921.

(1) (1892) I. L. R., 18 Mad., 489.

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tion case should for the time being (*filhal*) be dismissed, but the attachment should remain in force," and this order was submitted to by the parties.

Held, that the order, though not the order which should have been passed, was binding upon the parties, and no fresh attachment was subsequently necessary. *Namuna Bibi* v. *Rosha Miah* (1), dissented from. *Dildar Husain* v. *Shio Narain* (2) distinguished.

FOR the purposes of this report, the facts of the case sufficiently appear from the judgment of the Court.

Mr. *S. A. Haidar*, for the appellants.

Babu *Piari Lal Banerji*, for the respondent.

PIGGOTT and WALSH, JJ.:—The essential point raised by this appeal admits of being briefly stated. The court below had before it an application for execution of a decree with which, on a particular date, it found itself unable to proceed further by reason of the default of the decree-holder. Under order XXI, rule 57, the duty of the court was, either to dismiss the application, or to adjourn the proceedings to a future date. On a dismissal of the application it is provided by the said rule that the attachment shall cease. The court did not follow, as it ought to have done, the provisions of the said rule. The order which it passed was to the effect that the execution case should, for the time being, be dismissed, but that the attachment should remain in force. That is not an order which the court ought to have passed; but the question before us is as to the effect of the said order when passed. The decree-holder on a subsequent date applied to the court to take up the proceedings at the stage at which they stood on the date of the order above-mentioned; that is to say, he asked the court to proceed with the sale of the property in question without any fresh attachment. The judgment-debtors objected that a fresh attachment was necessary and that objection has been overruled by the court below; hence this appeal.

There is authority in support of the appellant's contention in the case of *Namuna Bibi* v. *Rosha Miah* (1). We can only say that we do not agree with the decision in that case and that the reasoning on which it is based does not commend itself to us. Moreover, that case is to a certain extent distinguishable from the present, for the execution court in the case now before us went

(1) (1911) I. L. R. 38 Calc., 482. (2) (1918) I. L. R., 41 All., 157.

1921

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out of its way to mark the nature of the order which it purported to pass by using the words "*filhal*," which we must render "for the present" or "for the time being." There can be no doubt as to the order which the court intended to pass and that order was submitted to by the parties. It was, in substance and effect, an order that the execution proceedings do stand adjourned *sine die*. It has, however, been contended before us that the principle laid down by the learned Judges of the Calcutta High Court in the case above referred to has been adopted and enforced by a Bench of this Court. The reference is to the case of *Dildar Husain* v. *Sheo Narain* (1). We are of opinion that that case is distinguishable on the facts. To begin with, the question before the court in that case concerned the rights of a *bonâ fide* transferee for value. Secondly, there had been no qualifying expression used in the order of dismissal such as we find in the order laid before us in the present case. While, therefore, we desire to lay stress on the fact, already pointed out by us, that the order directing the execution case to be dismissed for the time being and the attachment maintained was not a proper order for the court to have passed, we are not prepared to treat it as a nullity and as having no effect upon the parties between whom it was passed. We think there is no force in this appeal and we dismiss it accordingly with costs.

Appeal dismissed.

1921
December, 22.

REVISIONAL CRIMINAL.

Before Mr. Justice Stuart.

EMPEROR v. ANWAR*

Criminal Procedure Code, section 239—Joint trial—Same transaction—Joint trial of the thief and of the receiver of stolen property.

Two bicycles were stolen from different places, and in each case one Anwar, an employee of a person called Ram Saran who kept a bicycle shop was seen loitering in the neighbourhood about the time when the bicycles disappeared. Parts of each of the stolen bicycles were afterwards found, some in the shop of Ram Saran and some in the house of one Narbada Prasad.

* Criminal Revision No 557 of 1921, from an order of I B Mundle, Sessions Judge of Allahabad, dated the 5th of September, 1921

(1) (1918) I. L. R., 41 All., 167.

1921

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Held that the joint trial of the three persons mentioned for offences under sections 379 and 411 of the Indian Penal Code was not illegal *Emperor* v. *Balabhai Hargovind* (1) and *Juwan* v. *Emperor* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *L.M. Roy*, for the applicant.

The Assistant Government Advocate (Mr. *R Malcomson*), for the Crown.

STUART, J.:—The facts are as follows. A bicycle was stolen from the precincts of the Allahabad Post Office. Another bicycle was stolen from the precincts of the Allahabad Bank. Parts of both stolen bicycles were found in the house of a man called Narbada Prasad. Parts of both stolen bicycles were found in the shop of a bicycle dealer called Ram Saran. Evidence was given to the effect that Anwar, an employee of Ram Saran in his bicycle shop, had been seen loitering both at the Post Office and at the Allahabad Bank just before the bicycles disappeared. All three men were charged before a Magistrate of the first class under section 411 of the Indian Penal Code, Anwar being charged in the alternative under section 379 of the Indian Penal Code. The magistrate convicted Narbada Prasad and Ram Saran under section 411 of the Indian Penal Code and Anwar under section 379 of the Indian Penal Code. Narbada did not appeal. Ram Saran appealed, and was acquitted on the merits. Anwar appealed, but his appeal was dismissed. He comes here in revision. The first point taken by his learned counsel is that the joint trial of Narbada, Ram Saran and Anwar was bad in law under the provisions of sections 234 and 239 of the Code of Criminal Procedure. How does the case stand against the three? The case for the prosecution was that Anwar had stolen both bicycles and that Ram Saran was in dishonest possession of parts of both bicycles and that Narbada Prasad was also in dishonest possession of parts of both bicycles, each knowing that these parts were stolen property. According to the view taken in the case of *Emperor* v. *Balabhai Harjovind* (1) the theft of the two bicycles and the dishonest possession of them knowing them to be stolen, that possession being by

(1) (1904) 6 Bom. L. R., 517. (2) (1912) 19 A. L. J., 815.

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different persons, formed one transaction, even though the receipt was not simultaneous with the theft. I agree with the view taken in that decision. I do not find that there is anything in my view contrary to the view expressed by LINDSAY, J., in the case of *Jiwan* v. *Emperor* (1), for there, the actual thief not being charged in the case, there was nothing to connect the three persons. Here it is the fact that Anwar, the actual thief, was charged with the receivers, which justifies the several acts being considered parts of one transaction. On the merits Anwar was clearly proved to have been loitering just before the theft of the bicycles. When the owners returned, the bicycles had disappeared, and Anwar had disappeared. Portions of the stolen bicycles were found in the shop in which he is employed. This being the case I do not see my way to interfere on the merits. I therefore dismiss this application.

Application dismissed.

MISCELLANEOUS CIVIL.

1922

January, 4.

Before Sir Justice Piggott and Mr Justice Walsh.

INAYAT-ULLAH KHAN (APPLICANT) *v.* NISAR AHMAD KHAN (OPPOSITE PARTY).*

Civil Procedure Code (1908), section 24—Transfer—Principles guiding a Court in considering an application for the transfer of a civil case.

In the matter of applications for the transfer of civil suits it is the duty of a court to insist upon any litigant applying for transfer making out a strong case in favour of the balance of convenience On the question of the balance of convenience, the convenience of the parties in the conduct of the litigation is certainly a relevant consideration *Tula Ram* v. *Harjwan Das* (2) and *Subba Bibi* v. *Maqbul Hussain* (3) followed, *Madho Prasad* v. *Moti Chand* (4) doubted.

THIS was an application under section 22 of the Code of Civil Procedure for transfer of a suit pending in the court of the Subordinate Judge of Shahjahanpur. The facts out of which the application arose are fully set forth in the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

* Civil Miscellaneous No 297 of 1921.

(1) (1921) 19 A. L. J., 815 (3) (1916) 14 A. L. J., 243
(2) (1882) I. L. R., 5 All., 60 (4) (1919) I. L. R., 41 All., 381

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Babu *Lalit Mohan Banerji*, for the opposite party.

PIGGOTT and WALSH, JJ.:—This is an application which raises both a question of principle and a question of fact of some importance. The defendant, who is the applicant, is the son of one Abdul Jalil Khan, deceased, and the plaintiff is the cousin of the deceased man, who claims to be his heir. Abdul Jalil Khan and the other members of his family were old residents of Shahjahanpur, which appears also to have been the ancestral home of the defendant. For the purposes of this case, however, it may be assumed that the deceased migrated to a place called Pusad in Yeotmal, a district of the Berars, which is now a portion of the Central Provinces, and died there in October of last year, after having made, so the defendant alleges, certain gifts by deed of his property in favour of the defendant. The suit is brought by the plaintiff as heir of the deceased man to set aside these gifts, and it has been brought in the court at Shahjahanpur as a matter of choice by the plaintiff who is of course in all cases *dominus litis*; probably because it is his ordinary home, the language of the court is his language and because, as he says, some of the property is situated in that district. However, the defendant, on the ground that having regard to the issues raised by the suit and the general convenience of the parties in view of the nature of the evidence which will have to be called on both sides in the suit, has applied to this Court to transfer the case from Shahjahanpur and altogether from these Provinces in order that it may be tried in the appropriate court in the Yeotmal district of the Berars in the Central Provinces.

The question of principle raised by the application was not very seriously argued, but our attention was drawn to certain reported cases which make it desirable that we should express our views definitely upon the question. No case is reported on the subject in the authorized reports, Allahabad series, since the year 1882 (I. L. R., 5 Allahabad). There have been decisions which have found their way into modern reports and we prefer to follow the decision reported in *Subba Bibi* v. *Maqbul Husain* (1), a decision by a member of this Court sitting alone

(1) (1916) 14 A. L. J., 242.

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who followed the view taken by the older case of *Tula Ram* v. *Harjiwan Das*, (1) and the invariable practice as it was then established in England (that old practice has now been codified in England in the form of a special rule), namely, to insist upon any litigant applying for transfer to make out a strong case of the balance of convenience. In *Tula Ram* v. *Harjiwan Das* (1), already referred to, the court recognized that as the real test, although it decided against the transfer. There is one further material case, namely, *Madho Prasad* v. *Moti Chand* (2), (another single Judge decision) where a member of this Court declined to adopt that rule and held without reference to any previous authority that the mere convenience of the parties was not a good test. We come to the conclusion that that view is not a sound one. After all, the convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the civil side.

That being the state of the law, the plaintiff in this case, as in every other, has undoubtedly a *primâ facie* right to decide the place of trial. The defendant may show, as he does here, exceptional circumstances. The question is whether those circumstances are such as to make it right to override the wish of the plaintiff and to direct the trial to take place at the most convenient tribunal. The defendant's main contention in this application is that he has to defend the deeds made in his favour against an attack made upon them by the plaintiff, and that both the attack and the defence must in the end turn upon the local evidence in the place where the deeds were executed, the suggestion being that they were executed by the deceased man in a condition of such ill-health as to make him either of not sufficiently sound disposing mind, or subject to the improper influences of some interested party so as to deprive him of the free exercise of his own volition.

To this contention the plaintiff makes several answers :—

Firstly, he alleges that his pedigree has been disputed. As to this the defendant has, by paragraph 6 of his own affidavit sworn on the 20th of December, 1921, admitted the plaintiff

(1) (1882) I. L. R., 5 All., 60 (2) (1919) I. L. R., 41 All., 881.

to be the cousin of the deceased man, and his counsel Mr. *Bajpai* in this Court on this application on his behalf formally admitted the plaintiff to be the heir of the deceased man. These admissions are binding upon both parties to the suit and this issue is, therefore, out of the suit and dispenses with a considerable number of witnesses who would otherwise be necessary from Shahjahanpur.

Secondly, the plaintiff makes the point that the ancestral home of both parties is in Shahjahanpur, that the wives of the deceased Abdul Jalil Khan lived there for the greater part of the time, and that some of the property in suit is situated there. This may be so. The points are really immaterial to the suit. The main issue will be, as we have stated, the condition of health and mind of the donor for some time antecedent to the alleged execution of the deeds and during the period between such execution and his death, and also the extent and nature of the influence exercised upon him during that period. Admittedly, during this period the donor lived at Pusad, according to the plaintiff for six months only, according to the defendant for nearly a year. It, therefore, appears from the position of both parties that the *res gestæ* and the appropriate witnesses on this head are situated at Pusad. Thirdly, the plaintiff makes a point of the language question. This would be a serious if not an insuperable objection to transfer if it were likely to affect the merits or the satisfactory disposal of the suit. The difficulty of language is one which is common to litigation in many parts of India, particularly when the parties belong to and speak the language of one Province and the events in issue occurred in a province where many material witnesses speak an entirely different one. In this case the difficulty to some extent cuts both ways. Moreover, inasmuch as the plaintiff has traded in Pusad for some years through a general attorney, with personal visits of his own, it is inconceivable that he has no one even in his own employ who can interpret Urdu and instruct a local lawyer in the language of the court, particularly when a great part of the necessary instructions can only relate to the collection and preparation of local evidence from people who speak the language of the court. This difficulty can be met by making it part

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of our order that any special costs of translating the record as it stands up to date, and reasonably to be incurred in employing an interpreter, if the plaintiff has none in his own employment, should be allowed as part of the costs of the suit in addition to those ordinarily allowed by the court.

Fourthly, there is the further point of the danger of delay based evidently upon some dilatory criminal proceedings which have already taken place in the Central Provinces. We have no ground for supposing that the appropriate Civil Court in the Central Provinces, where the plaintiff will have to sue, will be less disposed to prevent avoidable delay than the court at Shahjahanpur. We can at least make it clear that in our view any attempts by the defendant unduly to delay the disposal, if they appear to be made *malâ fide* as the result of this order, ought to be punished in the trial court by special orders as to costs thrown away or unduly incurred.

On the other hand, the defendant alleges that he will have to call more than 20 local witnesses. On the question how many he proposes to call, the plaintiff only mentions Urdu-speaking witnesses in Pusad; but he does not allege that he proposes to call no strictly local witnesses. This is significant. It is almost certain that he will have to call some. He lays stress on 4 or 5 Urdu-speaking witnesses in Pusad, but there is obviously no difficulty about these if an interpreter is present, even if they cannot speak Marathi. One is said to be a medical man whom it is obviously more convenient to keep near his patients as far as possible. The plaintiff also lays stress upon four witnesses whom he will have to call from Shahjahanpur on the question of the deceased man's illness. But as there must be some transfer of witnesses in any event, there seems no great hardship in their attending the court in person as they attended the place where the deceased lay ill.

The question of possession of the house at Shahjahanpur on which the plaintiff also lays stress is clearly a subsidiary one. The three witnesses whom he proposes to call can be duly examined on commission and ought to be so examined, particularly on a point on which evidence of purely eye-witnesses is notoriously vague, irrelevant and unreliable.

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On the whole, having regard to the attitude adopted by the defendant, and not without hesitation, we come to the conclusion that the balance of convenience is in favour of the Central Provinces and that the case must be transferred from the jurisdiction of these Provinces to enable the plaintiff to sue at the appropriate court in the Central Provinces, the defendant undertaking to do nothing unduly to delay the trial, to contribute Rs. 100 in any event, to the pleaders' fees already paid by the plaintiff to his lawyers, and not to object to the reasonable costs of translation of the present record and of the interpretation of the evidence being made costs in the cause. The costs of this application will abide the event.

Application granted.

APPELLATE CIVIL.

1922
January, 5.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KASHI PRASAD SINGH AND OTHERS (PLAINTIFFS) v. BALBHADDAR SINGH AND ANOTHER (DEFENDANTS)*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 177—Suit for ejectment—Decree for ejectment reversed on appeal—Application to Court of Revenue for restitution—Application dismissed—Appeal—Civil Procedure Code (1908), section 144.

An application for restitution of possession under section 144 of the Code of Civil Procedure in consequence of the decree against them having been reversed on appeal was made by the defendants in an ejectment suit to the court of first instance, being a Court of Revenue. That court, however, rejected the application.

Held that the order of the Court of Revenue was not a "decree" and no appeal lay therefrom to a Civil Court. *Zohra v. Manju Lal* (1) referred to.

THIS was an appeal from a judgment of a single Judge of the Court under section 10 of the Letters Patent. The facts of the case are thus stated in the judgment under appeal, which was as follows :—

This is called a second appeal. It is a claim by the appellants for possession of certain land. It is only necessary to state the facts to see that they are clearly entitled to possession.

* Appeal No. 87 of 1921, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 28 All., 763.

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The decision of the court below is fatal to their claim and unless this Court can interfere they have no remedy. I cannot believe that this is the true state of the law. If it were, it would be calculated to bring the law into ridicule and contempt.

The following are the facts The defendants Balbhaddar Singh and others formerly brought a suit in the Rent Court for the ejectment of Kashi Prasad and others, the present appellants, who were defendants in that suit. They defended the suit on the ground that they were in possession as usufructuary mortgagees The Assistant Collector decreed the suit for ejectment against them in May, 1910, and in May, 1911, the then plaintiffs and the present defendants, respondents to this appeal, obtained possession. An appeal was brought from the decree of the Assistant Collector by the defendants in that suit on the revenue side and the case went up to the Board of Revenue. The Board of Revenue decided that as a question of proprietary title was involved the appeal should have been brought to the District Judge.

The District Judge in October, 1912, allowed the appeal and decreed that the defendants, the present appellants, were entitled to remain in possession. That decree was confirmed by the High Court in March, 1914, and there is, therefore, between the parties a decree of this Court awarding possession to the present appellants. The High Court might have gone on to direct the defendants by express order to give up possession forthwith, but the High Court did not do so. As a result of the High Court's decree the present respondents were bound to give up the possession which they had obtained in 1911 under the decree of the Assistant Collector. They have been wrongfully in possession since that date and are resisting the appellants' claim against them to give up possession, in every possible way. They are in contempt and I had grave doubts, when I heard what the case was about, whether I ought to hear their counsel at all.

Failing to get possession the present appellants applied on the revenue side to the court of the Assistant Collector. In the form in which the matter now reaches this Court, it has been treated as a suit and it comes before me as a second appeal. The application in the Revenue Court, however, was clearly an

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application under section 144 of the Code of Civil Procedure for restitution. The Assistant Collector dismissed it on an absolutely untenable ground. An appeal was then brought to the District Judge who disagreed with the view of the Assistant Collector and held that the justice of the case was entirely with the appellant, but he held also that there was no appeal from the refusal of the Revenue Court to make an order. The *ratio decidendi* in the authority quoted, namely, *Masih-ullah* v. *Majid-un-nissa* (1), is that section 144 cannot be applied to proceedings before Courts of Revenue and that the remedy of a person entitled to restitution in consequence of the reversal of a decree passed by a Court of Revenue is by means of a separate suit. It seems to me to follow from this that when section 144 speaks of the "*court of first instance*" to which the party entitled by way of restitution may apply, that cannot be read as meaning the Revenue Court. The High Court has no jurisdiction over the Revenue Court and cannot compel it to carry out its decrees. But there must be a court of first instance, and I am prepared to hold that where in a case like this the original decree has been passed in the court of revenue and the case has reached the High Court by way of the District Court, the court of first instance for the purpose of the section must be the first Civil Court subject to the jurisdiction of the High Court which has seisin of the matter, and that the District Judge in this case instead of dismissing the appeal on a technical point ought to have treated the appeal as an original application to itself as the court of first instance and granted it. Sitting as a court of appeal I think I ought to do what the court below should have done and I make an order for restitution under section 144. The Privy Council clearly held that it might be done by summary process of suit; *Doorga Pershad* v. *Tara Pershad* (2). It seems to me further that there is an alternative method by which the prevailing injustice in this case can be cured. If an application cannot be made to a Revenue Court under sub-section (1) of section 144, the provisions of sub-section (2), which prohibits a suit, has no operation, and, following the decision to which I have referred, I am of opinion that a suit might be

(1) (1903) I. L. R., 26 All., 149. (2) (1865) 3 W. R. (P. C.), 11.

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brought. A suit has been brought, although not in a correct form. I am prepared further to treat the application to the Revenue Court as a proper suit, in which case an appeal (the question of title being involved) would lie to the District Judge, and the point being one of law, an appeal lies to this Court and I think I ought to allow it and direct the defendants to give up possession.

There is a further method by which this wrong may be righted in my opinion. This Court clearly has jurisdiction to enforce its own decrees as against parties who appeared before it. As I have said the respondent in this Court is in contempt and is defying the decree of the High Court. Under section 151 of the Code and under the general powers of superintendence conferred upon this Court I treat this appeal, in the alternative, as an original application, and under the inherent power of the Court make an order in the ends of justice and to prevent the abuse of the process of the Court I direct the respondent to give possession of the land within three weeks from to-day and to pay all the costs of the proceedings here and in the court below. In my opinion there is ample justification for taking this course to be found in the case of *Kulada Prasad Tewari* v. *Sadhu Charan Tewari* (1) and the Privy Council case above-mentioned: *Doorga Purshad* v. *Tara Purshad* (2). I, therefore, make a formal order allowing the appeal of the plaintiffs, or the application of the applicants, as the case may be, and direct the defendants to hand over possession to the appellants forthwith. If they do not do so within three weeks from the date of this order, I shall direct proceedings to be brought against them for contempt of court. Report must be made to me by the appellants within three weeks from the date of this order as to whether possession has been delivered to them. I direct further that the plaintiffs are entitled to mesne profits from the 23rd of March, 1914, the date of the final decree in this Court, down to the 23rd of March, 1917, the date of the making of this application, and from that date forward until the delivery of possession, and I refer the following issues to the lower appellate court as a matter separate from and

(1) (1917) 3 Pat. L. J., 435. (2) (1868) 8 W. R. (P. C.), 11.

independent of the order which I have made against the defendants for delivery of possession.

1. What are the mesne profits of the land, having regard to the then value of the land, to which the appellants are entitled from the 23rd of March, 1914 to the 23rd of March, 1917?

2. What are the mesne profits of the land, having regard to the then value of the land, to which the appellants are entitled since the 23rd of March, 1917?

The answers to these issues should be stated at a rate per mensem. The parties will be at liberty to produce any further or additional evidence. The usual ten days will be allowed for filing objections.

This is not the original judgment I delivered, but I have had to deliver it again, owing to the original being lost.

The defendants appealed.

On this appeal—

Dr. *Kailas Nath Katju* and Munshi *Kamla Kant Varma*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

MEARS, C. J., and BANERJI, J.:—This litigation appears to have had a very chequered career. In the year 1910 a suit was brought in the Revenue Court by the present appellant for the ejectment of the defendants from certain plots of land. The court of first instance, that is, the Assistant Collector of the first class, decreed the claim and ordered ejectment. An appeal was preferred from that decree to the Commissioner and the appeal was dismissed. The case was then taken to the Board of Revenue, and the Board of Revenue held that the appeal from the decree of the court of first instance ought to have been preferred to the District Judge. Accordingly an appeal was preferred in the court of the District Judge and it succeeded and the claim of the plaintiff was dismissed in 1912. A second appeal to this Court was also dismissed. Meanwhile, after the passing of the decree of the court of first instance that decree was put into execution and the present appellant obtained possession of the holding by ejectment of the tenants. After the decree of the District Judge and the High Court, the respondent applied to the Assistant Collector under section 144 of the Code

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of Civil Procedure for restitution, that is, for restoration of possession to them. This application was rejected by the Assistant Collector, who was of opinion that the remedy of the respondents was one under section 80 of the Agra Tenancy Act. From this order the respondents appealed to the District Judge. The District Judge considered that the decision of the court of first instance rejecting the application was not correct, but he held that the order of the court of first instance was final and no appeal lay to him. On this ground he dismissed the appeal. A second appeal was preferred to this Court and was heard by a learned Judge of this Court. He set aside the orders of the courts below and directed possession to be restored within a term fixed by him in his order. From this decision of the learned Judge of this Court this appeal has been preferred under the Letters Patent.

We find it difficult to agree with the reasons given by the learned Judge for his decision. Those reasons were summarized to us by Dr. *Sen* on behalf of the respondents, and he supports them, but without assigning any reasons for doing so. The learned Judge held that 'the court of first instance' referred to in section 144 was not a Revenue Court, but the Civil Court which heard the appeal from the order of the first court. With this view we cannot agree. In a suit under the Tenancy Act the court of first instance is the Revenue Court which heard the suit, and not the court of appeal. The learned Judges says that the decree of the High Court was a decree directing possession to be restored. This is not so. The decree of this Court only dismissed the appeal preferred to it from the decree of the District Judge in the suit for ejectment. The effect of the decree of the District Judge was to entitle the respondents to be restored to possession, and for recovering possession the remedy of the respondents was to apply under section 144 of the Code of Civil Procedure, and this application for restitution is to be made to the court of first instance under the provisions of the section. The section further provides that no separate suit will lie for recovery of possession where the decree of the court of first instance has been reversed by a higher court. The learned Judge's opinion that a separate suit could be brought and the

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application was to be deemed to be a suit cannot be supported in view of the provisions of section 144 itself, which forbids the institution of a separate suit. The learned Judge of this Court further held that the appeal to the High Court might be deemed to be a regular suit for possession or an application for delivery of possession. As we have pointed out, an application for delivery of possession could only be made to the court of first instance and not to this Court. This Court does not execute its own decree and even if the decree of this Court was a decree directing possession to be restored, the application for restoration of possession could only have been made to the court of first instance and not to this Court. Therefore, in our opinion, the learned Judge of this Court was not entitled to make an order for restitution. Dr. *Sen's* main contention was that the order of the court of first instance refusing to grant the respondent's application was a decree within the meaning of section 2 of the Code of Civil Procedure, and that, therefore, an appeal lay to the District Judge. This contention is concluded by the principle of the ruling of the Full Bench in the case of *Zohra* v. *Mangu Lal* (1). That was, it is true, a case in which the question was whether an appeal lay from an order in execution of a decree passed by an Assistant Collector of the first class. It was held that under the whole scheme of the Tenancy Act a distinction was made between an "order" and a "decree" and that the word "decree" in section 177 of that Act was a decree in a suit and did not include an order which, if the definition of a decree applied to the case, might be deemed to be a decree under the Code of Civil Procedure. The learned Judges who decided the Full Bench case made a distinction between a decree in a suit and an order. It was held that an appeal lay from a decree in a suit, but an order passed by an Assistant Collector of the first class was not a decree and was not open to appeal. The principle laid down in the Full Bench case equally applies to the present case and upon that principle we must hold that the learned District Judge was right in holding that no appeal lay to him. In this view the appeal to this Court ought to have been dismissed. No doubt it is a hard case, but under

(1) (1905) I. L. R., 28 All., 768.

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the provisions of the law we are unable to interfere in the matter.

We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court. In the circumstances of this case we direct the parties to pay their own costs of the two appeals to this Court.

Appeal allowed.

1922 *January*, 5.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad

REOTI LAL AND ANOTHER (DEFENDANTS) v. MANNA KUNWAR (PLAINTIFF) *

Act No XXVI of 1881 *(Negotiable Instruments Act), section* 78—*Promissory note—Suit on note not maintainable by a* benamidar

The provisions of the Negotiable Instruments Act, 1881, do not admit of a suit being brought upon a promissory note by a *benamidar* whose name does not appear upon the document. *Dora Lal* v. *Sewak Ram* (1) and *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2) followed. *Gurunath* v. *Sivayya* (3) dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Panna Lal*, for the appellants.

Mr. *G. W. Dillon*, for the respondent.

RYVES and GOKUL PRASAD, JJ. :—The plaintiff Musammat Manna Kunwar sued to recover a sum of money due on a *ruqqa* executed by the defendants in favour of one Kishori Lal. The plaintiff's allegation was that the money was advanced by her and that Kishori Lal, in whose name it was drawn, was merely her *benamidar* as she was parda-nashin. Kishori Lal had died without heirs and the plaintiff was entitled to recover the money on this *ruqqa*. The defence was, so far as we are now concerned, that the plaintiff could not maintain the suit. The trial court found all the issues of fact in favour of the plaintiff, namely, that she had advanced the money in cash to the defendants who had executed the *ruqqa benami* in the name of Kishori Lal who was a near relation of the plaintiff. The trial court, however, dismissed the suit on the ground that under section 78 of the

* Second Appeal No 27 of 1920, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 22nd of July, 1919, reversing a decree of Nawab Husain, Munsif of Haveli, dated the 9th of May, 1919.

(1) (1915) 19 A. L. J., 695. (2 (1904) I. L. R., 28 Mad., 205.
(3) (1897) I. L. R., 21 Mad., 391.

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Negotiable Instruments Act read with section 8 of that Act Musammat Manna Kunwar could not maintain the suit. She appealed. The learned Subordinate Judge agreed with all the findings of fact found by the trial court but held that the suit was nevertheless maintainable. What he says is this:—"The *ruqqa* in question is an agreement. It provides for interest and is payable on demand. It is true that under section 78 of the Negotiable Instruments Act only the holder can sue whether the instrument is negotiable or not, but the rule does not apply to agreements. I hold that the *ruqqa* in question is an agreement and the *cestui que trust* can sue on it". He nevertheless calls the document a *ruqqa*. We have read the document and there is no doubt whatsoever that it falls within the definition of a promissory note given in section 4 of the Negotiable Instruments Act. The learned counsel who appears for the respondent does not, and indeed could not, support the reasoning of the learned Subordinate Judge, but he argues that section 78 of the Negotiable Instruments Act does not bar a suit by the person really entitled to the money payable under a promissory note. It bars the payment out of Court, it is argued, to any one except the payment as defined in section 8 of the Act so as to get a valid discharge, and that that is all it does, and he relies on the case of *Gurumurti* v. *Sivayya* (1). That case certainly does seem to support his contention, but no reference in that case is made to the provisions of the Act. That judgment, however, has been considered in three later cases by the Madras High Court. In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2) a Divisional Bench of that Court dissented from it. It was, however, again considered by a Full Bench of the same High Court in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (3). It is true that that case was the converse of the present case. There it was held that a defendant could not set up the plea that the plaintiff, who sued on a promissory note and in whose name the promissory note was, was not in fact the real owner. That is true, but in

(1) (1897) I. L. R., 21 Mad., 391 (2) (1904) I. L. R., 28 Mad., 205.
(3) (1906) I. L. R., 30 Mad., 88

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the course of the judgment the case of *Gurumurti* v. *Sivayya* (1) was expressly overruled. In *Subramanya Tevan* v. *Arunachala Tevan* (2) this latter case was followed. In our own Court in the case of *Dori Lal* v. *Sewak Ram* (3) the point was considered by a Judge sitting alone. The facts there were on all fours with the facts here, and that learned Judge followed the view taken in the later Madras cases to which we have referred. We agree with his view. We think that the decision of the first court was correct. The result is that we allow the appeal and setting aside the decree of the court below, restore that of the court of first instance with costs.

Appeal allowed.

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January, 6.

Before Mr. Justice Piggott and Mr Justice Walsh.

CHIMMAN LAL, POSTI MAL (PLAINTIFF) *v* PHUL CHAND, FATEH CHAND (DEFENDANT) *

Act No. IX of 1899 *(Indian Arbitration Act), section* 19—*Arbitration—Reference made by one party—Subsequent institution of suit by the other—No application for stay of suit, but award delivered by sole arbitrator—Application to file award.*

Under the terms of a contract which provided that all disputes arising there under should be referred to arbitration, one of the parties made a reference and sent notice to the other to appoint another arbitrator on their side. The other party refused to join in the arbitration and filed a suit. The first party never applied for stay of the suit, but their arbitrator proceeded with the arbitration and delivered an award. *Held*, on application to make the award a rule of court, that the applicant, not having asked for a stay of the suit, must be taken to have waived his right to arbitration and was not entitled to a decree on the award *Ram Prosad Suraj Mull* v. *Mohan Lal Lachminarain* (4) and *Appavu Rowther* v. *Seeni Rowther*, (5) referred to.

UNDER a contract, dated the 7th of August, 1918, the respondents agreed to sell 20 bales of cloth to the appellants. One of the terms of the contract was that in case of a dispute between the parties the matter shall be referred to arbitration.

On the 16th of February, 1919, the respondents despatched the goods. The appellants refused to take delivery on the ground that the goods were not according to sample.

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* First Appeal No 106 of 1921, from an order of I. B. Mundle, District Judge of Cawnpore, dated the 30th of April, 1921.

(1) (1897) I. L. R., 21 Mad., 391. (3) (1915) 13 A. L. J., 695.
(2) (1907) 18 M. L. J., 186. (4) (1910) I. L. R., 47 Calc., 752.
(5) (1917) I. L. R., 41 Mad., 115.

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On the 30th of August, 1919, the appellants appointed one Mr. Khosla as their arbitrator, gave notice of the same to the respondents and asked the latter to nominate their arbitrator. The respondents, however, sold the goods and instituted a suit for damages against the appellants. On the 17th of September, 1919, they gave the arbitrator and the appellants notice of their having instituted the suit and of their unwillingness to refer the matter to arbitration. On the 25th of September, 1919, the arbitrator made an *ex parte* award in favour of the appellants and filed it in the Court of the District Judge of Cawnpore who, on objection being taken, refused to file it and subsequently set it aside. Hence the appeal.

Dr. *Surendra Nath Sen* (with him Munshi *Ajudhia Nath*), for the appellants :—

The grounds on which the award has been set aside by the learned District Judge are, firstly, that the institution of the suit nullifies the award ; secondly, because the appellants did not make an application under section 19 of the Arbitration Act (IX of 1899) for the stay of the suit. My submission is that section 19 does not apply to the circumstances of the present case. That section applies only when, the matter not having advanced beyond the stage of mere agreement to refer, a suit is instituted by one of the parties. It has no application when a reference has already been made. In the latter case no application need be made under section 19. I am supported by *Sawyer* v. *Louis Dreyfus & Co.* (1).

Supposing the award had been made a day before the institution of the suit, it could not be said that an application should have been made to refer the matter to arbitration *de novo*.

The case of *Dinabandhu Jana* v. *Durga Prasad Jana* (2) is distinguishable because in that case no reference had been made to arbitration. As regards the case of *Ram Prosad Suraj Mull* v. *Mohan Lal Lachminarain* (3) it is submitted that the Hon'ble Judges have gone too far. Their Lordships base their decision on *Doleman & Sons* v. *Ossett Corporation*, (4) but it was not decided in that case that the mere institution of the

(1) (1913) 20 Indian Cases, 504.
(2) (1919) I. L. R., 46 Calc., 1041.
(3) (1920) I. L. R., 47 Calc., 752.
(4) (1912) 3 K. B., 257.

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suit took away the jurisdiction of the arbitrator and made the reference invalid. Absence of an application under section 19 could at the most be taken as a submission to jurisdiction, but it could not invalidate the reference which was otherwise valid. Section 14 lays down that an award can be set aside either when the arbitrator has misconducted himself or when the award has been improperly procured. None of these circumstances occur here. Institution of a suit by the opposite party is not laid down as a ground for setting aside an award.

The existence of an award will be a complete answer to the suit. Under section 5 a submission is irrevocable. The respondents, therefore, could not ignore the arbitration proceedings and rush to the court with their suit. Their suit will be sufficiently met by the award.

Mr. *G. W. Dillon* (with him Mr. *B. E. O'Conor* and Babu *Saila Nath Mukerji*), for the respondents :—

The law will not enforce the specific performance of an agreement to refer to arbitration. The court, if duly appealed to, has the power to refer the matter to arbitration, but if it refuses to do so or if no application is made to it, it has the seisin of the cause and the arbitrator becomes *functus officio*. There cannot be two tribunals having jurisdiction at the same time. Before the time had elapsed for us to nominate an arbitrator we gave notice of our unwillingness to refer to arbitration and before the expiration of the same period we filed the suit. Reference by one party under such circumstances cannot be a complete reference. Therefore the case should be governed by section 19. An application should have been made under that section. If they had made that application we could have shown to the court how the matter was hurried through the arbitration even after notice of the suit. The court, in all probability, would not have granted their application. Having failed to make an application it does not lie with them now to object to the suit. The award was improperly procured, inasmuch as it was given after notice of the suit to the arbitrator and the opposite party.

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Dr. *Surendra Nath Sen* in reply :—

It is not competent to the respondents to argue that there was no completed reference. If one party fails to appoint an arbitrator, the other party is entitled to appoint his own arbitrator as sole arbitrator. Such a reference will be a complete reference. We had under the terms of the contract appointed an arbitrator, and reference had been made to him. Under section 5 the respondents could not revoke the submission.

PIGGOTT and WALSH, JJ. :—We have decided to dismiss this appeal on the simple ground that the defendant having deliberately refused to utilize the machinery provided by section 19, namely, by applying for a stay, must be taken to have waived his right to arbitration. We would merely add that we are not prepared, as at present advised, to go the length of the decisions in *Ram Prosad Suraj Mull* v. *Mohanlal Lachminarain* (1) and *Appavu Rowther* v. *Seeni Rowther* (2), and to hold that in all such cases an award must necessarily be set aside. It must be borne in mind that some of the observations of Lord Justice FLETCHER MOULTON relied upon were unnecessary for the decision of the case, and were not adopted by the other members of the English Court of Appeal and that the case was one in which the circumstances were peculiar. We are not prepared to adopt, without qualification, the view which the Madras High Court seems to have adopted in I. L. R., 41 Mad., 115 referred to above, that the moment a suit is brought the arbitrators have become *functi officio* and any award made by them is without jurisdiction. That statement must be qualified by the existence of the power of stay contained in the second schedule to the Code of Civil Procedure or in section 19 if the arbitration is one under the Act of 1899. This power may be taken advantage of by the other party to the suit applying for a stay of the suit brought against him.

Subject to these remarks we dismiss this appeal with costs.

Appeal dismissed.

(1) (1920) I. L. R., 47 Calc., 752. (2) (1917) I. L. R., 41 Mad., 115.

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January, 6

Before Mr. Justice Piggott and Mr. Justice Walsh.

PARBATI AND ANOTHER (DEFENDANTS) *v.* RAJA SHIAM RIKH AND OTHERS (PLAINTIFFS) *

Act No III of 1907 (Provincial Insolvency Act), section 60(2)—Insolvent—Proceedings against insolvent arising out of execution of Revenue Court decree.

A judgment-debtor, against whom were outstanding decrees of a revenue court for rent, became insolvent. The decree-holder seeking to execute his decrees was met by an objection that the property against which execution was sought had been transferred by the insolvent judgment-debtor to his wife and minor son. The decree-holder, thereupon, with the leave of the Insolvency Court, brought a suit for a declaration that the transfers made by the Insolvent were collusive and sham transactions, and that the properties should be declared to have vested in the Receiver. *Held* that, inasmuch as the Provincial Insolvency Act did not apply to proceedings in the Revenue Courts, the suit was misconceived and was not maintainable. *Kalka Das* v. *Gajju Singh* (1) followed.

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Dr *Kailas Nath Katju*, Pandit *Radha Kant Malaviya* and Munshi *Baleshwari Prasad*, for the appellants.

Mr. *B. E. O'Conor*, for the respondents.

PIGGOTT, J.:—This is a second appeal by the defendants in a suit for a declaration. These defendants are the wife and the minor son of one Chatar Singh who has been adjudicated an insolvent. The principal respondent, the plaintiff in the suit, is a land-holder who on various dates between the 7th of March and the 29th of March, 1911, had obtained from a Revenue Court decrees for arrears of rent against the aforesaid Chatar Singh. After the latter had been adjudicated an insolvent, this decree holder applied to the Insolvency Court, ostensibly under the provisions of section 60 (2) of the Provincial Insolvency Act, No. III of 1907, for the leave of the Court to institute the present suit. The object of this suit is to challenge the validity of two deeds of transfer, dated the 10th of July, 1908, and the 16th of May, 1910, respectively, whereby Chatar Singh, more than two years prior to his insolvency, had purported to transfer immov-

* Second Appeal No 1160 of 1919, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 13th of December, 1918, confirming a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 30th of June, 1916.

(1) (1921) I. L. R., 43 All., 519.

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le property in favour of his wife and his minor son. The suit as resisted upon various grounds, but the particular point hich has been principally argued before us was not taken in ther of the courts below, and the reason for this becomes ovious enough as we consider that point in detail. There were bjections taken to the form of the suit and a plea of limitation as raised, but both the courts below have decided in favour of he plaintiff in respect of legal objections, as well as on the erits, and have granted him the decree for which he sought. Now, the decision of the lower appellate court in this case is lated the 19th of December, 1918. On the 4th of March, 1921, a Full Bench of this Court pronounced its decision in the ase of *Kalka Das* v. *Grijju Singh* (1) in which the whole question of the relations between the jurisdiction of the Revenue Courts constituted under the Local Tenancy Act, No. II of 1901, on the one hand, and the courts acting under the Provincial Insolvency Act, No. III of 1907, was re-considered and determined. There had been a previous decision of this Court, *Raghubir Singh* v. *Ram Chandar* (2), according to which a land-holder could not institute a suit for arrears of rent under the provisions of the Tenancy Act against a tenant who had been adjudicated an insolvent. This was the precise point dealt with by the Judges of this Court in the Full Bench case. They overruled the older decision and held that the Provincial Insolvency Act did not apply at all so as to govern or affect the rights of a land-holder against his tenant, enforceable by means of any suit or proceeding under the Local Tenancy Act.

In the second appeal now before us the main argument addressed to us on behalf of the appellants has been based upon the principles laid down in this Full Bench decision. It seemed to us obviously necessary to allow the point to be raised and argued. The question is one of jurisdiction, and it could not well have been raised in the courts below in view of the state of the law as declared by this Court prior to the Full Bench decision of the 4th of March, 1921. We are not prepared to dissent from or to criticize the decision of the Full Bench in

(1) (1921) I. L. R., 43 All., 510. (2) (1911 A. L. J., 1257.

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Kalka Das v. *Gajju Singh* (1). Accepting the law to be what is therein stated, it becomes beyond question that if the Provincial Insolvency Act would not bar a suit by a land-holder against his tenant brought before a Revenue Court under the provisions of the Tenancy Act, neither could it bar a proceeding in execution of a decree before such court. The whole of the present action, therefore, has been misconceived. The proper remedy of the plaintiff respondent was, in the first place, to take out execution of his decrees in the Revenue Court as against any property which he alleged to be the property of his judgment-debtor. If the present appellants, or either of them, had resisted the seizure of any such property on the ground that it belonged to them in virtue of a transfer made prior to the insolvency, a question would have been raised which the Execution Court could deal with, in the first instance, and in respect of which either party aggrieved by the decision of the Execution Court would have a right to seek a determination by means of a regular suit. The suit out of which the present appeal arises was brought with the leave of the court for the benefit, not of the plaintiff respondent alone, but of the Receiver and of the entire body of creditors. For the reasons stated it seems clear to us that the suit was entirely misconceived and not maintainable at all in its present form. We must, therefore, allow this appeal, set aside the decrees of both the courts below and direct that the suit be dismissed in its entirety. We order accordingly, but under the circumstances of the case we think it only just to direct that both parties bear their own costs in all three courts.

WALSH, J.:—I entirely agree, but having regard to the exceptional circumstances of the case and the miscarriage which appears to have resulted up to the present moment, I propose to say a few words with reference to the course which it seems to me is still open in law to remedy the mischief, and which,—on the materials before us one can of course say no more,—I should be prepared to take if I were a Revenue Officer approached by the plaintiff for the appropriate remedy in spite of the serious lapse of time Section 14 (2) of the Limitation Act provides that in computing the period of limitation prescribed for

(1) (1921) I. L. R., 43 All., 510.

any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party for the same relief, shall be excluded where such proceeding is prosecuted in good faith in a court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. On the facts as found in the lower courts, the wife and the son in this case are in truth the same party as the insolvent and this Court is unable to entertain the suit by reason of jurisdiction. As the law stands, it is quite clear that the jurisdiction of the Civil Courts, strictly so called, and of the Insolvency Court respectively, on the one hand, and of the Revenue Court on the other, are mutually exclusive. A decree-holder, who is the landlord of an agricultural tenancy to which the Agra Tenancy Act applies, is not a creditor under the Provincial Insolvency Act in respect of his rent or decree. His decree is not a provable debt. Those statements are the corollaries of the Full Bench decision referred to by my brother which was passed in March, 1921.

But in this case the insolvent, who is the father of the minor transferee and the husband of the female transferee whose interests are attacked by this suit, was adjudicated insolvent in May, 1913. On that date the decision which has been overruled, namely, *Raghubir Singh* v. *Ram Chandar* (1) which had been decided in October, 1911, stared the plaintiff in the face, and any member of the legal profession who had been consulted by the plaintiff,—having regard to the plaint in this suit and the difficulties of procedure one may fairly assume that the plaintiff was carefully advised,—calling himself a lawyer and paying any respect to the decisions of this Court, was bound to treat the law as set forth by that decision. The decision was as clear and emphatic upon the point as it was possible for a decision to be. It pointed out, erroneously as it now appears, that the Provincial Insolvency Act prohibited any suit being brought against a person who is declared an insolvent. It went on to declare that a landlord was not a secured creditor, and that he was in exactly the same position as any other creditor and that

(1) (1911) 8 A. L. J., 1287.

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he could only seek his remedy from the Insolvency Court, subject to any possible existing remedy by way of distress which the Insolvency Court might permit. Under those circumstances an attempt by the present plaintiff to execute his decrees, or to have applied to the Revenue Court to act in the face of that decision, would have looked very much like an abuse of the process of the court. He took, and in my opinion rightly took, the only step open to him under the circumstances. He applied to the Insolvency Court, which this Court had told him was the only court which could entertain his claim, and obtained the leave of the Insolvency Court to bring the very suit which we are now compelled to hold was misconceived. He framed a plaint with scrupulous care and accuracy and claimed reliefs carefully prepared according to the then judge-made law, and for myself I do not hesitate to say that if the decision in 1911 of this Court had not been overruled, that suit would have been, if established in fact, clearly maintainable. The result of the suit, so far as it went, was to establish a gross fraud in fact committed by the insolvent and his family upon the plaintiff and the other creditors, and to obtain from two courts a decision in the plaintiff's favour which, it cannot be too often repeated, was justified by the then existing state of the decisions. It was only after the appeal which we are now disposing of was filed, that the Full Bench decision declared the law afresh and destroyed the whole foundation upon which the plaintiff's suit had been based. It seems to me not only consonant with justice, but appropriate to the intention of section 14, sub-section (2), of the Limitation Act, if ever a case was appropriate to the terms of that section, that the Revenue Court should consider whether under these circumstances the plaintiff should not be allowed to seek a remedy of which he had been deprived by the decision of this Court.

Appeal allowed.

PRIVY COUNCIL.

J. C.*
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March, 21.

MUHAMMAD ABDUL GHANI AND ANOTHER (PLAINTIFFS) *v.* FAKHR JAHAN BEGAM AND OTHERS (DEFENDANTS).

(*and connected appeal.*)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Muhammadan law—Gift—Taking possession—Constructively taking possession—Gift of entire zamindari estate—Possession taken of part only—Donor reserving usufruct of part—Construction of deed—Whether gift or will.

The widow of a Sunni Muhammadan had the right of an owner under Muhammadan law to dispose by gift or will of an estate. By a deed executed in 1884 she "made a gift of the entire zamindari estate" to the brother of her deceased husband, "with the exception of the villages and *sir* lands of the estates, specified below, which shall, during my life-time, remain in my and my relation's possession, free of rent and without payment of Government revenue; and I do hereby invest the donee with the power to have the mutation of names effected in his favour. Now I have nothing to do with the gifted property and estate. I shall keep the villages and *sir* lands, which have been exempted hereunder, for my life-time without the power of alienation by mortgage, sale and gift; and after me, the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the ilaqa." On the execution of the deed the donee took possession of the estate with the exception of the specified villages and *sir* lands. He thereafter paid the Government revenue upon the excepted villages and *sir* lands, but there was no mutation of names as to them, nor did he take possession, until the death of the donor in 1905.

Held that the deed should be read as making a gift *inter vivos* of the excepted villages and *sir* lands, and not as a disposition of them by will; and that as there was a gift of the entire zamindari estate with possession taken of part, possession of the excepted villages and *sir* lands had been taken constructively, so as to satisfy the requirements of Muhammadan law as to gifts.

Umjad Ally Khan v. *Mohumdee Begam* (1) followed as to the validity of a gift reserving a right of usufruct.

Judgment of the Court of the Judicial Commissioner affirmed.

CONSOLIDATED Appeal (No. 150 of 1920) from a judgment and two decrees of the Court of the Judicial Commissioner (December 19th, 1917) reversing a decree of the Subordinate Judge of Kheri.

The suit was brought by the appellants to eject the respondents from certain immovable property in Oudh, in circumstances which are fully stated in the judgment of the Judicial Committee.

* *Present:* Viscount CAVE, Lord SHAW, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1867) 11 Moo., I. A., 517.

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The main questions for determination in the appeal were two, namely, (1) whether as to the property in suit a deed executed on the 7th of March, 1884, by Munni Bibi, the widow of a Sunni Muhammadan taluqdar, was to be construed as making a gift to Lutf-ullah Khan, or as an intended testamentary disposition, and (2) whether, if the deed constituted a gift, the requirements of Muhammadan law were satisfied.

A further question which arose in the courts in India, namely, whether Munni Bibi, as devisee from her husband of a taluqdari estate held by him under a primogeniture sanad, had power to dispose of it by will according to Muhammadan law, was concluded by the judgment of the Board in *Ghulam Abbas Khan* v. *Amatul Fatima* (1), recently delivered.

The Subordinate Judge held that the deed of 1884 was in part a deed of gift, and was effectual as regards the property of which possession was delivered thereunder, but that as regards the property in suit it was testamentary, and as such was valid to the extent of one-third only. His conclusion consequently was that the first defendant, as son and heir of Lutf-ullah, was entitled to one third and the plaintiffs to two-thirds. He further held that the plaintiffs had not lost their rights by any consent or estoppel; and that defendants 2 to 5 were not transferees for value without notice, within section 41 of the Transfer of Property Act, 1882.

Appeals were preferred by defendants 2 to 5 to the Court of the Judicial Commissioner of Oudh, the plaintiffs (the present appellants) preferring cross-objections by which they claimed that the decree should have awarded them the whole property. In the result a decree was passed on appeal on the 19th of December, 1917, against the plaintiffs, and the cross-objections were dismissed.

The Judicial Commissioners were not agreed on the questions whether the property which had formed the taluqdari estate continued to be governed by the primogeniture sanad, and whether the deed of the 7th of March, 1884, was in any respect testamentary; their decision, however, did not turn on those questions. The first Additional Judicial Commissioner (Mr. STUART)

(1) (1922) I. L. R., 43 All., 297; L. R., 48 I. A., 155.

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was of opinion that the deed was a deed of gift of the property in suit. He rejected the view, expressed by the Subordinate Judge, that as a gift the transaction was invalid under the Hanafi law owing to failure to deliver possession. On that point he said: "There are three essentials of a gift under the Hanafi law—declaration, acceptance and seisin. It is clear that here we have both declaration and acceptance. The remaining point is—was there seisin within the sense contemplated by law? This subject has been treated in detail in Syed Amir Ali's well-known work on Muhammadan law, 3rd Edition, Ch. 2, p. 62, *et seq.* According to the view taken therein the delivery of possession required under the Hanafi law varies according to the nature of the property transferred, and, where the donor is only in symbolical possession, the transfer can also be symbolical and may be effected under the terms of the deed of transfer itself. Where a donor transfers the corpus of the property, retaining a usufruct for life, physical possession must necessarily remain with the donor. There is nothing in the Hanafi law to prohibit a gift of the corpus combined with the retention of the usufruct. Under the Hanafi law a limited estate cannot be created; but such a transfer does not create a limited estate. The old view which finds place in some of the illustrations of Macnaghten must be considerably modified in the light of the more recent authoritative pronouncements on the subject. I refer in particular to the decision of their Lordships of the Privy Council in *Mahomed Buksh Khan* v. *Hosseini Bibi* (1), where their Lordships lay down that, where everything reasonable has been done to perfect a contemplated gift, nothing more is required. In the circumstances of the case physical possession could not be given. Possession by the enjoyment of rents could not be given. It would have been difficult even to effect mutation of names, for the lady would have been prejudiced in making collections from tenants if the name of Lutf-ullah Khan had been entered in the revenue papers. What then could she do? The transfer of title deeds (if any) already in her possession would have been purely formal, for the title was contained in the deed of transfer itself. She did this much, that she cove-

(1) (1888) I. L. R., 15 Calc., 684 (701, 702)

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nanted in the deed not to transfer her interests in the property in question during her life-time, and this stipulation satisfies the conditions of the law with regard to the delivery of possession."

The second Additional Judicial Commissioner referred to the decision of the Board in *Umjad Ally Khan* v. *Mohumdee Begam* (1) and the observations thereon in the work above mentioned. As to the validity of a gift reserving a usufruct, "the decisions", he said, "establish that a donor should give such possession as the nature of the property or interest given admits of. If the property given includes a portion over which the donor wants to retain his or her possession for a definite time, it would be unreasonable to hold that he or she should deprive herself of the possession of that portion before the gift can be validated. To require her to withdraw her connection forthwith is to compel her to give more than what she intended to give, or in other words, to disqualify her from reserving anything for herself, though it may fall short of proprietary rights. Her possession, so long as the rights so reserved are exercised, is virtually possession on behalf of the owner, for a donor would refuse to accept a gift burdened with such a condition, if he did not assent to it."

1922, February 20th, 21st; March 2nd. De Gruyther, K. C., and *Kenworthy Brown* for the appellants. Having regard to the decision of the Board in *Ghulam Abbas Khan* v. *Amatul Fatima* (2) the succession to the taluqa property is not governed by the sanads; Act III of 1910 (U. P.) is not retrospective and does not affect this case. Munni Bibi had, therefore, the ordinary rights of an owner according to Muhammadan law. The effect of the deed of 1884 as to the properties in suit was not testamentary but to make a gift. There can be a valid gift of the corpus of property, with a reservation of a right to the income for life; *Umjad Ally Khan* v. *Mohumdee Begam* (1). But in that case there was delivery of possession, while here there was no such delivery, not even mutation of names. That

(1) (1867) 11 Moo. I. A., 517. (2) (1921) I. L. R., 43 All., 297; L. R., 48 I. A., 135.

renders the gift wholly ineffective: *Khajoorconissa* v. *Rowshun Jehan* (1); Hamilton's Hedaya (Grady's Ed.) Bk. 30, p. 482; Wilson's Anglo-Muhammadan Law, 3rd Ed., paras. 301, 302, 306, 315. No doubt the delivery of possession requisite varies with the nature of the property, but in each case the question is whether the donor did all he could to perfect the gift: *Kali Das Mullick* v. *Kanhaya Lal* (2), *Mahomed Buksh Khan* v. *Hosseini Bibi* (3). The facts in those cases were very different from the facts here. In the present case not only did the donor remain in possession without mutation of names, but she continued to take the profits and there was no notice to the tenants. In *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (4) and *Sadik Husain Khan* v. *Hashim Ali Khan* (5), the Board recently held that where the donor is in possession there must be delivery to validate the gift. If the deed of 1884 had a testamentary effect the trial Judge rightly held that Lutf-ullah took only a third: Wilson's Anglo-Muhammadan Law, 3rd Edition, para. 270. The fact that Abdul Ghani acquiesced in the claim made in 1910 under a different document is no evidence of acquiescence in or ratification of the right of Lutf-ullah under the deed of 1884, which was not then put forward as being a will. The mere fact that no suit was brought by the plaintiff earlier does not raise an estoppel: *Baswantapa Shivlapa* v. *Ranu* (6). The facts do not render section 41 of the Transfer of Property Act, 1882, applicable. The purchasers were put upon inquiry and the onus was upon them to show that they acted in good faith. That onus was not discharged.

Dube for the respondents was not called upon.

March 21st.—The judgment of their Lordships was delivered by Sir JOHN EDGE.

These are consolidated appeals by the plaintiffs from two decrees, dated the 19th of December, 1917, of the Court of the Judicial Commissioner of Oudh, which reversed the decree,

(1) (1876) I. L. R., 2 Calc., 184; L. R., 3 I. A., 291.
(2) (1884) I. L. R., 11 Calc., 121; L. R., 11 I. A., 218.
(3) (1888) I. L. R., 15 Calc., 684; L. R., 15 I. A., 81.
(4) (1907) I. L. R., 28 All., 439.
(5) (1916) I. L. R., 38 All., 627.
(6) (1884) I. L. R., 9 Bom., 86.

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dated the 13th of July, 1915, of the Subordinate Judge of Kheri, and dismissed the suit.

The suit was brought on the 20th of February, 1914, in the Court of the Subordinate Judge by Muhammad Abdul Ghani Khan and Muhammad Abdul Rahman Khan against Muhammad Hamid-ullah Khan, Musammat Fakhr Jahan Begam, Musammat Asghari Begam, Musammat Chand Bibi and Pandit Sheo Dayal, for the possession of mauza Mundia Misir, a 4 anna 5 pie share in mauza Gundhia, and two groves, a house and certain *sir* land in Jalalpur, and for mesne profits. It was a suit of ejectment on title. The plaintiffs alleged that the right to possession of all the properties in suit was in them as the heirs of Musammat Munni Bibi, who had died on the 16th of June, 1906, and that the defendants had no title. The defendants, who are the respondents, were not all jointly interested in any of the properties. Some of the defendants were in possession of some of the properties, others of the defendants were in possession of other parts of the properties in suit, but the different titles of all the defendants originated in a document of the 7th of March, 1884, which was executed by Munni Bibi, and has been variously construed as a deed of gift and as a will.

Munni Bibi was the widow of Niamat-ullah Khan, who died childless on the 9th of August, 1867. Niamat-ullah Khan, Munni Bibi and the plaintiffs, who were her first cousins, were Muhammadans of the Sunni sect, and the plaintiffs were, when Munni Bibi died in 1906, her heirs, according to the Muhammadan law applicable to Sunnis. The family to which these Muhammadans belonged had, several centuries ago, been Thakurs professing the Hindu religion, who were converted to Islam, and at one period of this suit it was contended by the defendants, or some of them, that the family had always continued to be governed in matters of succession and inheritance by the rules of the Mitakshara and not by the Muhammadan law. That contention has been abandoned.

Niamat-ullah Khan lived in the village of Jalalpur and was a taluqdar of Oudh. After the mutiny of 1857 he received from the British Government the taluqa of Agar Buzurg, which included, with many villages not now in question, all the

immovable property in question in this suit except the 4 anna 5 pie share in mauza Gundhia, which was granted to Munni Bibi on the 15th of November, 1876, by the British Government absolutely in her own right. Although Niamat-ullah Khan had died in 1867, his name was entered as that of the taluqdar of the taluqa Agar Buzurg in Lists I and II, which were prepared under Act I of 1869. Instances of the names of other persons who had died before 1869 being entered in those lists occur.

The British Government granted to Niamat-ullah Khan in his life-time a primogeniture sanad in which the Taluqa Agar Buzurg is described as the estate of Jalalpur in Zillah Mohamdi. That sanad is as follows:—

"C. WINGFIELD,

"Chief Commissioner of Oudh.

"To

"NIAMATU-ULAH OF JALALPUR.

"Know all men that whereas by the Proclamation of March, 1858, by His Excellency the Right Honourable the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, Charles John Wingfield, Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title and possession of the estate of Jalalpur in Zillah Mohamdi consisting of the villages as per list attached to the kabuliat you have executed, of which the present Government revenue is Rs. 4,752 (five thousand seven hundred and fifty-two).

"Therefore this sanad is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever, subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms, destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform and of showing constant good faith, loyalty, zeal and attachment to the British Government according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant that in the event of your dying intestate, or of any of your successors dying intestate, the estate shall descend to the nearest male heir, according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage, gift, bequest or adoption to whomsoever you please.

"It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding

under you shall be secured in the possession of all the subordinate rights they formerly enjoyed As long as the above obligations are observed by you and your heirs in good faith so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature "

The kabuliat mentioned in the sanad related to more than 30 villages and included mauza Mundia Misir and mauza Agar Buzurg (Jalalpur), parts of which are claimed by the plaintiffs in this suit. The plaintiffs do not claim any interest in any of the other villages mentioned in the kabuliat, and do not contend that Munni Bibi was not entitled to give or bequeath those other villages to whom she liked. As will be seen presently, her title to, and interest in, all the villages mentioned in the schedule to the kabuliat was as the devisee of her husband Niamat-ullah Khan.

On the 20th of May, 1865, Niamat-ullah Khan made the following will :—

"I am Muhammad Niamat-ullah Khan, Taluqdar of Jalalpur, pargana Kazanpur and Aliganj.

"Whereas the Government has asked for a will from the declarant, and the declarant has no issue and is issueless up to this time, and it is necessary to appoint a legatee after me, I, while in the enjoyment of sound health and perfect intellect, during my life-time, having executed this will, declare that, after me, my wedded wife shall be the owner and possessor of the movable and immovable property, like myself. If the heirs belonging to the brotherhood lay a claim, the same shall be invalid and untenable before the Government. Wherefore I have executed these few presents by way of a will so that it may serve as an authority and be of use in time of need "

Under the sanad Niamat-ullah Khan had power to bequeath the taluq of Agar Buzurg (the estate of Jalalpur) to whom he pleased, and under that will the taluq passed on his death on the 29th of August, 1867, to his widow Munni Bibi. At the date of the will of Niamat-ullah Khan, there were living two younger brothers of Niamat-ullah Khan, of whom Lutf-ullah Khan was the elder and Ibrahim Khan was the younger. Those younger brothers survived Munni Bibi. One question in this case is whether Munni Bibi was a "successor" of Niamat-ullah Khan within the meaning of the sanad; if she was, she had power to make a gift of, or to bequeath, the whole taluq or any part of it to whom she pleased. If she was not a "successor" of Niamat-ullah Khan within the meaning of the sanad, she had power to make such a

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gift as would be recognized as a valid gift by the Muhammadan law applicable to Sunnis, of the whole talaq or of any part of it to whom she pleased.

On the 7th of March, 1884, Munni Bibi executed a document which has been construed by the Subordinate Judge as partly a deed of gift and in part a will, and has been construed by the Judicial Commissioners as a deed of gift. As translated by the official translator it is, so far as is material, as follows :—

"I am Thakurain Mussammat Munni Bibi, wife of Muhammad Niamat-ullah Khan, Talukdar of Mirzapur and Jalalpur, parganas Bhur and Paila, district Kheri.

"Whereas my husband, during his life-time, bequeathed the entire property of the aforesaid ilaqa to me, and I, in accordance with the said will, am in possession and ownership of the same; now I, while in sound health and in possession of perfect intellect, without force and reluctance, of my own free will, make a gift of the movable and immovable property, the entire zamindari and talukdari estate, etc., in favour of Muhammad Lutf-ullah Khan, son of Muhammad Ibad-ullah Khan, the brother of my husband, the detail whereof is being given below, with the exception of the villages and sir lands, etc., of the estates, specified below, which shall, during my life-time, remain in my and my relation's possession, free of rent and without payment of Government revenue; and I do hereby invest the donee with the power to have the mutation of names effected in his favour. Now I have nothing to do with the gifted property and estate. I shall keep the villages and sir lands, which have been exempted hereunder, for my life-time without the power of alienation by mortgage, sale and gift; and after me, the donee shall also be the owner of the said exempted property. The donee shall pay the Government revenue of the exempted estate from the ilaqa with the exception of the revenue of Patti village Gundhia, which I shall pay out of my own pocket. The donee shall pay all the debt with which the estate is encumbered, —I, the donor, having nothing to do therewith. Wherefore I have executed these few words by way of a deed of gift on a stamp of Rs. 600-8 by fixing the value of the property at Rs. 60,000 (sixty thousand), so that it may serve as an authority and be of use when required."

Mr. KANHAIYA LAL, in his judgment on the appeal to the Court of the Judicial Commissioner, gives a slightly different translation of part of the document of the 7th of March, 1884, but in the opinion of their Lordships there is no material difference between the two translations, they bear the same meaning. It should be mentioned that the punctuation in each translation is the punctuation of the person who made the translation. "Patti mauza Gundhia" was the 4 anna 5 pie share in mauza Gundhia which the Government had, subject to the payment of

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I write to say that as regards the property left and possessed by my deceased sister, Munni Bibi, the wife of Niamat-ullah Khan, talukdar and rais of Jalalpur, you inquire about, I do not at all turn against the purport of her will. You can obtain the said property under the will by bringing a suit or otherwise, and I have no objection. You are quite free to take necessary steps. Abdur Rahman Khan, too, says the same thing. I have inquired from him also."

Muhammad Abdul Ghani Khan was called as a witness for the plaintiffs in the suit of 1910, and on being shown his letter of the 4th of November, 1910, said: "This letter I wrote with the permission of my brother Abdur Rahman Khan, who is joint with me," and "I never thought of the matter whether I am entitled to the assets of Munni Bibi or not. I disclaim a share in the property if I am entitled to it." When Abdul Ghani Khan gave his evidence in that suit he was 42 years of age, and it appears to their Lordships impossible to believe that he and his brother had never before 1910 considered the question as to whether they as the heirs in Muhammadan law of Munni Bibi had any claim to any part of the valuable property which had been hers. The plaintiffs in the suit of 1910 failed to prove the execution of the alleged will, and their suit was dismissed.

The learned Subordinate Judge, Mahmud Hasan, who tried the present suit, construed the document of the 7th of March, 1884, as a will, so far as it related to the property in question here, and as a deed of gift so far as it related to the other property dealt with by it. He held that section 41 of the Transfer of Property Act, 1882, did not apply to the cases of Pandit Sheo Dayal and of the other transferees, and as he considered that it was not proved that Munni Bibi's heirs had assented to the bequest by her of the property in question, he gave the plaintiffs a decree for the possession of a two-third share of that property. It should here be mentioned that it does not appear from the record that Pandit Sheo Dayal had given evidence in this suit or that he had made any inquiry as to the title of Lutf-ullah Khan to mortgage, or the title of Hamid-ullah Khan and his mother and wife to sell the 4 anna 5 pie share in mauza Gundhia. From that decree the defendants Musammat Fakhr Jahan Begam

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4 anna 5 pie share in mauza Gundhia, to Lutf-ullah Khan, reserving to herself for her life the usufruct of the property in question in this suit. Apparently they based their judgments on a decision of the Board in 1867, in *Umjad Ally Khan* v. *Mohumdee Begam* (1).

It had been contended on behalf of the plaintiffs before the Judicial Commissioners that there had been no possession of this property now in question, given to or taken by Lutf-ullah Khan, and that consequently the gift was void under the Muhammadan law, but they considered that the clear intention of Munni Bibi as shown by her deed was that the title to this property should immediately vest in Lutf-ullah Khan, and that she should have no right to sell, mortgage, or otherwise dispose of the property, and they found that as the usufruct was reserved for her life by Munni Bibi it was not possible for physical possession of the property in the suit to be given to Lutf-ullah Khan in Munni Bibi's life-time. In the opinion of the Judicial Commissioners everything which was reasonably possible to make perfect the gift had been done and that nothing more was required to make the gift a good gift according to Muhammadan law. The Judicial Commissioners by the decrees of the 19th of December, 1917, set aside the decree of the Subordinate Judge, and dismissed the cross-objections and the suit. From the decrees of the Judicial Commissioners these consolidated appeals have been brought.

Their Lordships will now consider whether the document of the 7th of March, 1884, may be regarded, so far as the property now in question is concerned, as a Muhammadan will, and if it is not a Muhammadan will, but is a deed of gift, then the question arises whether in the circumstances of this case the gift of this property to Lutf-ullah Khan became a valid gift under the Muhammadan law applicable to Sunnis.

In construing the document of the 7th of March, 1884, it has to be borne in mind that in Muhammadan law the broad distinction between a gift (*hiba*) and a bequest (*wasiat*) is that in the case of a gift the immediate right of property in the subject of the gift is conferred, and in the case of a bequest the vesting of the right of property is postponed. Owing to the fact that there

(1) (1867) 11 Moo., I. A., 517; at pp 547, 548.

4 anna 5 pie share in mauza Gundhia, to Lutf-ullah Khan, reserving to herself for her life the usufruct of the property in question in this suit. Apparently they based their judgments on a decision of the Board in 1867, in *Umjad Ally Khan* v. *Mohumdee Begam* (1).

It had been contended on behalf of the plaintiffs before the Judicial Commissioners that there had been no possession of this property now in question, given to or taken by Lutf-ullah Khan, and that consequently the gift was void under the Muhammadan law, but they considered that the clear intention of Munni Bibi as shown by her deed was that the title to this property should immediately vest in Lutf-ullah Khan, and that she should have no right to sell, mortgage, or otherwise dispose of the property, and they found that as the usufruct was reserved for her life by Munni Bibi it was not possible for physical possession of the property in the suit to be given to Lutf-ullah Khan in Munni Bibi's life-time. In the opinion of the Judicial Commissioners everything which was reasonably possible to make perfect the gift had been done and that nothing more was required to make the gift a good gift according to Muhammadan law. The Judicial Commissioners by the decrees of the 19th of December, 1917, set aside the decree of the Subordinate Judge, and dismissed the cross-objections and the suit. From the decrees of the Judicial Commissioners these consolidated appeals have been brought.

Their Lordships will now consider whether the document of the 7th of March, 1884, may be regarded, so far as the property now in question is concerned, as a Muhammadan will, and if it is not a Muhammadan will, but is a deed of gift, then the question arises whether in the circumstances of this case the gift of this property to Lutf-ullah Khan became a valid gift under the Muhammadan law applicable to Sunnis.

In construing the document of the 7th of March, 1884, it has to be borne in mind that in Muhammadan law the broad distinction between a gift (*hiba*) and a bequest (*wasiat*) is that in the case of a gift the immediate right of property in the subject of the gift is conferred, and in the case of a bequest the vesting of the right of property is postponed. Owing to the fact that there

(1) (1867) 11 Moo., I. A., 517; at pp. 547, 548.

property in question in this suit on the ground that no possession was actually taken of this particular property, and no mutation of names in respect of this particular property was obtained, by Lutf-ullah Khan until Munni Bibi had died in 1906.

That contention has raised a question by no means easy of solution. The solution of that question depends upon what are the facts here and upon what is the rule of Muhammadan law applicable to those facts. In considering what is the Muhammadan law on the subject of gifts *inter vivos* their Lordships have to bear in mind that when the old and admittedly authoritative texts of Muhammadan law were promulgated there were not in the contemplation of any one any Transfer of Property Acts, any Registration Acts, any Revenue Courts to record transfers of the possession of land, or any zamindari estates, large or small, and that it could not have been intended to lay down for all time what should alone be the evidence that titles to lands had passed. The object of the Muhammadan law as to gifts apparently was to prevent disputes as to whether the donor and the donee intended at the time that the title to the property should pass from the donor to the donee, and that the handing over by the donor and the acceptance by the donee of the property should be good evidence that the property had been given by the donor and had been accepted by the donee as a gift.

For a valid gift *inter vivos* under the Muhammadan law applicable in this case, three conditions are necessary, which their Lordships consider have been correctly stated thus:—"(*a*) Manifestation of the wish to give on the part of the donor; (*b*) the acceptance of the donee, either impliedly or expressly; and (*c*) the taking of possession of the subject-matter of the gift by the donee, either actually or constructively." ("Muhammadan Law," by Syed Ameer Ali, 4th edition, vol. 1, p. 41.) In their Lordships' opinion the whole zamindari property mentioned in the deed, and not parts of it only, must, for the purposes of this case, be regarded as one property, the taking possession of any part of it being constructively a taking possession of the whole. The wish of Munni Bibi to give that property to Lutf-ullah Khan and his acceptance of it on the 7th of March, 1884, are clearly

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court. From the date of the adjudication the receiver takes over all rights in the insolvent's property which the insolvent himself possessed, and one of those rights would be to alienate co-parcenary property belonging to himself and his minor sons in satisfaction of antecedent debts incurred by him, provided those debts were not tainted with immorality. *Falirchand Motichand* v. *Motichand Hurakhand* (1) and *Rangayya Chetti* v. *Thankachalla Mudali* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jang Bahadur Lal* and Munshi *Shiva Prasad Sinha*, for the appellants.

Babu *Benoy Kumar Mukerjee*, for the respondent.

PIGGOTT and WALSH, JJ. :—These are two appeals in insolvency The appellants are the minor sons of the insolvent Bindraban, appearing in the matter under the guardianship of their mother. Certain property which the receiver desires to make available for the satisfaction of the insolvent's debts was claimed by the appellants, on the ground that it had been conveyed to them by the will of their paternal grandfather. It may be noted at once that it has been proved and is not now contested, that the insolvent Bindraban had separated from his father. The said father was supposed to have executed two wills on one and the same date, by which he left property (dealt with by him as his self-acquired property) to the present appellants, the sons of Bindraban, and to another set of grandsons, the sons of a pre-deceased son, in equal shares. The two documents were produced and evidence was called before the District Judge to prove them The District Judge was entirely sceptical as to the genuineness of these documents. There is certainly force in the argument on which he chiefly relies. As they stand the two papers are somewhat elaborate documents, very carefully written and elaborately attested. If the executant was going to take so much trouble in the matter, it seems a curious circumstance that he should not have got them registered When in connection with this we take the fact that on each document the executant is supposed to have put his mark in the form of a thumb-impression, and that the thumb-impression is a mere smudge of ink—practically incapable of identification—suspicion as to the genuineness of the document is certainly confirmed.

(1) (1883) I. L. R., 7 Bom., 428. (2) (1895) I. L. R., 19 Mad., 74.

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(1) (1883) I. L. R., 7 Bom., 433. (2) (1895) I. L. R., 19 Mad., 64.

there cited. We think, therefore, that the question of law as well as the question of fact tried out in the court below must be decided against the appellants. We dismiss these appeals, accordingly, with costs.

Appeals dismissed.

1921

BAWAN DAS v. O M CHENE

1922 *January* 1, 16.

Before Mr. Justice Piggott and Mr. Justice Walsh.

LALTA PRASAD (DECREE-HOLDER) *v.* SURAJ KUMAR AND OTHERS (JUDGMENT-DEBTORS) *

Civil Procedure Code (1908), section 48, clause 2(a)—Execution of decree—Limitation—"Fraud"—Execution prevented by a series of frivolous objections on the part of the judgment-debtors

Where the judgment-debtors, by means of a series of absolutely frivolous and futile objections, succeeded in preventing execution of the decree against them for more than twelve years, it was *held* that their conduct amounted to fraud within the meaning of section 48, clause 2(*a*), of the Code of Civil Procedure and the decree-holder was entitled to the benefit of the section *Beni Prasad* v *Kashi Nath* (1), *Mewa Lal* v *Ahmad Ali* (2), *Evans* v *Edmonds* (3), *Jolliffe* v *Baker* (4) and *Derry* v *Peek* (5) referred to

THE facts of this case were as follows:—

A decree was obtained in the court of the Subordinate Judge of Cawnpore, on the 16th of November, 1900. On appeal the decree was upheld by the High Court, on the 19th of February, 1903. The decree was against two sets of defendants. After the decree the defendants first set sued for a declaration that they were minors and were not bound by the decree because they were not properly represented. They got the declaration on the 1st of July, 1907. During all this period the execution of the decree was stayed.

In 1908 the decree-holders sought execution against the defendants second set. The latter objected that under an agreement prior to the decree the decree-holder had agreed not to execute the decree against them. The objection was disallowed.

In 1909 an application was made for the sale of immovable property of one of the judgment-debtors. Objections were put in

* First Appeal No. 171 of 1921, from a decree of Kashi Prasad, First Subordinate Judge of Cawnpore, dated the 22nd of January, 1921

(1) (1909) 6 A. L. J., 401 (3) (1858) 13 C. B., 777

(2) (1911) 9 A. L. J., 17. (4) (1883) 11 Q. B. D., 255

(5) (1889) 14 A. C., 337

there cited). We think, therefore, that the question of law as well as the question of fact tried out in the court below must be decided against the appellants. We dismiss those appeals, accordingly, with costs.

Appeals dismissed.

1921

BAIJAN DAS v. O. M. CHENE

1922 *January* 16.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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(5) (1889) 14 A. C., 337

As regards the twelve years' rule of limitation, the application no doubt is made after more than the period contemplated by law, but two points are to be noted in this connection. Firstly, the execution was stayed till the 1st of July, 1907, i.e., during the period when the litigation was going on between the defendants first set and the decree-holder. Secondly, the present judgment-debtor made a number of frivolous objections to all the applications with the intention of delaying and defeating the decree-holder's right. All these objections proved futile and were rejected. For instance, when in the year 1908 the decree-holder made an application for execution, the judgment-debtors said that the decree-holder had, under an agreement previous to the decree, agreed not to execute it against them. This objection was naturally dismissed. Again, in the year 1909 when an application was made for the sale of immovable property of Suraj Kumar, objections were put in by his brothers, who also claimed a share in it. The ultimate result of that litigation was that a mortgage of the same property was executed in favour of the decree-holder for a sum of Rs. 5,000. So, that objection was also a frivolous one. A number of times summonses and warrants were issued, but they could not be served and executed. All that shows that the judgment-debtors were acting in bad faith, raising hopeless and frivolous objections, and evading the process of law with the sole intention of gaining time and delaying the rights of the decree-holder. Such conduct on their part amounts to fraud within the meaning of section 48, sub-section 2 (*a*), of the Code of Civil Procedure. I am supported in this view of the law by the following authorities *Beni Prasad* v. *Kashi Nath* (1), *Mewa Lal* v. *Ahmad Ali* (2), *Pattakara* v. *Rangasami Chetti* (3) and *Jogendra Nath Pathak* v. *Mirza Mohammad Husain* (4)

Pandit *Madan Mohan Nath Raina* (for Dr. *Kailas Nath Katju*), for the respondents:—

The application of 1915 having been made more than twelve years after the date of the decree, it was rightly dismissed as time-barred. Any subsequent application made after that was

(1) (1909) 6 A. L. J., 401. (3) (1883) I. L. R., 6 Mad., 365.

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The question regarding the application of section 48 of the Code of Civil Procedure is a more difficult one. The fact is that until the month of July, 1907, the decree-holders were being held up by a subsequent litigation, in which it was finally decided that their decree could not be executed against one set of defendants who were minors at the time it was passed. This does not affect the validity of the present execution, but merely serves as a partial explanation of the long delay which has affected those proceedings. When the decree-holders took out execution in the year 1903, an objection was raised on behalf of the brothers of one of the present respondents, that is, the party against whom the decree was admittedly capable of execution, which led to further litigation and, after a decision in this Court in favour of the decree-holder on the question of limitation, to a compromise under which a substantial portion of the decree was realized. Since then the judgment-debtors have obstructed the execution of the decree in various ways, even in connection with this present application they seem to have avoided service of the notice and to have succeeded with difficulty in obtaining a re-hearing in the court below after an *ex parte* order had been passed against them. Taking a broad view of the evidence, we think that the principles affirmed by this Court in cases like those reported in *Beni Prasad* v. *Kashi Nath* (1) and *Mewa Lal* v. *Ahmad Ali* (2) are applicable. We hold that execution of this decree has been obstructed by fraud on the part of the judgment-debtors to a sufficient extent to entitle the decree-holders to the further opportunity sought by them under this present application. We, therefore, allow this appeal, set aside the order of the court below and send the case back to that court with directions to proceed with the execution according to law. The decree holders appellants will be entitled to their costs in this matter in both courts.

WALSH, J.:—I agree. I propose to add a few words upon the question of fraud dealt with by the learned judge. It is clear to my mind that he has taken much too narrow a view of his function. He says that the mere filing of frivolous objections

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Lord Justice COTTON in *Derry* v. *Peek* (1) quoted at page 360 in 14 Appeal Cases, said :—"What in my opinion is a correct statement of the law is this that where a man makes a statement to be acted upon by others which is false and which is known by him to be false or is made by him recklessly or without care whether it is true or false, that is fraud."

This principle ought to be strictly applied in execution cases just as in any ordinary suit for decision.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr Justice Piggott.

H. BEVIS AND CO. (APPLICANT) *v* RAM PRASAD (OPPOSITE PARTY) *

Practice—Subordinate courts—Rules of High Court prescribing hours of sitting for subordinate courts—Case taken up after 5 p.m.—Material irregularity.

Where a court subordinate to the High Court, in contravention of a rule of the court prescribing certain usual hours of sitting for subordinate courts, took up a fresh case after 5 p.m., and dismissed it on account of the absence of the plaintiff, it was *held* that this amounted to a material irregularity justifying the intervention of the High Court.

THE facts of this case are sufficiently stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the opposite party.

PIGGOTT, J.:—This is an application in revision against an order of the Judge of the Court of Small Causes at Cawnpore rejecting an application to have a suit restored, which had been dismissed for non-appearance on the part of the plaintiff when the suit was called on for hearing. The facts alleged by the plaintiff have not been controverted, either by affidavit of the opposite party, or by anything placed on record by the presiding Judge himself I am entitled, therefore, to assume that those facts are admitted. The suit in question was down for hearing on the 3rd of March, 1921. The plaintiff was personally present in court up to 5 p.m. At that hour the court was still

*Civil Revision No 85 of 1921.

(1) (1889) 14 A C, 337 (360).

1922

LALTA PRASAD v. SURAJ KUMAR.

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1922

January, 2

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1922

H. BEVIS & Co. v. RAM PRASAD

was within his jurisdiction in determining whether or not sufficient cause had been shown by the plaintiff for his absence when the suit was actually called on for hearing. The question, however, in my opinion is very distinctly one for the consideration of this Court in the exercise of the powers of superintendence given it by the Provincial Small Cause Courts Act. If proceedings such as those now before me are upheld by this Court, in the absence of any representation as to the existence of exceptional circumstances warranting the said procedure, the practical result will be that this Court must acquiesce in the open disregard of the very proper rules which it has issued for the purpose of regulating the business of subordinate courts. Under the circumstances of the case this suit should, in my opinion, have been readmitted for hearing. I am even prepared to say that the learned Judge of the court below did, in my opinion, act in the exercise of his jurisdiction with material irregularity where, without any previous warning to the public and as I must presume, in the absence of any exceptional circumstances which could be pleaded as warranting such a course, he called on this particular suit for hearing after the hour of 5 p.m

I allow this application and, reversing the order of the court below, direct that the suit in question be restored to the pending file of the Court of Small Causes at Cawnpore and set down for hearing according to law. The costs of this application will be costs in the cause.

Application allowed

APPELLATE CIVIL

1922

January, 16.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad

BECHU SINGH AND OTHERS (PLAINTIFFS) *v.* BALDEO SINGH AND OTHERS (DEFENDANTS)*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22—*Act No. XII of* 1881 *(N. W. P. Rent Act), section* 9—*Occupancy tenant—Inheritance—Succession to tenant dying before* 1902

* Second Appeal No. 377 of 1920, from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 8th of January, 1920, confirming a decree of Abdul Halim, Subordinate Judge of Mirzapur, dated the 7th of August, 1918.

1922

H. Bevis & Co. v. Ram Prasad

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I allow this application and, reversing the order of the court below, direct that the suit in question be restored to the pending file of the Court of Small Causes at Cawnpore and set down for hearing according to law. The costs of this application will be costs in the cause.

Application allowed.

APPELLATE CIVIL.

1922

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Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

BECHU SINGH AND OTHERS (PLAINTIFFS) *v.* BALDEO SINGH AND OTHERS (DEFENDANTS)*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22—*Act No. XII of* 1881 *(N.-W. P. Rent Act), section* 9—*Occupancy tenant—Inheritance—Succession to tenant dying before* 1902.

* Second Appeal No. 877 of 1920, from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 8th of January, 1920, confirming a decree of Abdul Halim, Subordinate Judge of Mirzapur, dated the 7th of August, 1918.

Singh at the time of his death 18 years ago, and also, apparently, that on the death of Musammat Suneta Kunwar they were the next reversioners They pleaded in paragraph 10 of the plaint that the cultivatory holding in dispute was jointly held by Ram Kirpal Singh and the plaintiffs and the said land was jointly cultivated and the defendants had nothing to do with it and were in wrongful possession. They, therefore, prayed for possession of the mortgaged property on payment of Rs 600, the mortgage-money paid by the defendants. They also claimed mesne profits. The defendants denied that the plaintiffs were the next reversioners, or that they had been joint with Ram Kirpal Singh. They also denied that the plaintiffs were in joint cultivation of the land with Ram Kirpal Singh. They further pleaded that Ram Kirpal Singh had adopted defendant No 1 as his son.

The trial court came to the conclusion that the plaintiffs and Ram Kirpal were not members of a joint Hindu family. It also found that the defendant No. 1 was not the adopted son of Ram Kirpal Singh. It was admitted in the trial court that the plaintiffs were the next reversioners to Ram Kirpal Singh. The court then went on to hold that as Ram Kirpal Singh had died before the present Tenancy Act came into force, the succession to the holding after the death of his widow would be governed by the provisions of the ordinary Hindu law, purporting to rely on the case of *Bisheshar Ahir* v. *Dukharan Ahir* (1). In the result the Munsif decreed possession to the plaintiffs on payment of Rs. 600 within three months from the date of his decree. Both parties went up in appeal. The learned Judge of the lower appellate court has confirmed the findings of the trial court on questions of fact involved in the case, but has held that the case of *Bisheshar Ahir* v. *Dukharan Ahir* (1) did not lay down that the proviso to section 9 of the Rent Act (XII of 1881) did not apply, and that the plaintiffs having failed to prove joint cultivation with Ram Kirpal Singh deceased were not entitled to succeed.

The plaintiffs come here in second appeal, and the contention urged by their learned vakil comes to this, that

(1) (1916) I. L. R., 38 All., 197.

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The case of *Nathu* v. *Gokalia* (1) is beside the point, inasmuch as in that case whether the Hindu law applied or section 9 of Act No. XII of 1881 applied, the result would have been the same. In that case, too, section 9 of Act No. XII of 1881 was not discussed.

In the present case it appears that the original tenant Ram Kirpal died before the Tenancy Act came into force. The succession to his estate was governed by Act No. XII of 1881 and a collateral could not inherit his property unless he was joint in cultivation with him. The plaintiffs founded their claim on the ground that they were members of a joint Hindu family with the deceased tenant and were as such interested in the cultivation. This issue has been found against them. It is true that there is no finding by the lower appellate court that they were not joint in cultivation with the deceased tenant. If the plaintiffs were not joint with Ram Kirpal, the whole fabric of their suit collapses. We do not see how they can claim a title to the tenancy. As we have stated above, the succession opened out to the estate of Ram Kirpal when the Rent Act of 1881 was in force. The actual possession of the plaintiffs, if they were then in existence, was merely postponed during the life-time of the widow. See *Dular* v. *Mulchand* (2). If the widow had not been in existence they could not have succeeded unless they had a share in the cultivation. If they were not in existence at that time they could not certainly come in as reversioners who have shared in the cultivation. Their rights arose then and as their joint cultivation was based on the family being joint, which has been found against them, we think the lower appellate court was right in dismissing their suit. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1915) I L R, 37 All, 658 (2) (1910) I L R, 32 All, 314

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BACHU SINGH v. BALDEO SINGH

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Appeal dismissed.

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EMPEROR
v.
SHEO DARSHAN SINGH.

Sukhnandan was sitting under a tree in Amchwara, in the Banda district, and that Sheodarshan Singh was sitting close by him. There is nothing to show how a quarrel arose between the two, but at about 2 p.m. in the afternoon, Sheodarshan and two other men set on Sukhnandan with *lathis*. Sukhnandan got up and ran away endeavouring to escape. They followed him, brought him down, and continued to rain *lathi* blows on him. Sukhnandan succumbed to his injuries. The injuries inflicted upon him were about as severe injuries as could be inflicted upon a human being with *lathis*. His skull was fractured. There were no less than 19 injuries upon the head and there were also other injuries upon the body. The man was battered to death in a most deliberate and merciless way. Apart from other evidence, three persons, Parshadi, Musammat Chunki and Khushali, who assert that they were eye witnesses of the affair and whom we see no reason to disbelieve, have deposed that Sheodarshan took part in the brutal assault upon the deceased. These witnesses were believed by the Sessions Judge and the assessors. Now, upon those facts, Sheodarshan Singh was undoubtedly guilty of murder. The reasons given by the Sessions Judge for finding that the offence committed was less than a murder show, we regret to say, a complete want of acquaintance with the law on the subject. He appears to think that if there is no premeditation and if an attack is made with *lathis* such as are usually carried by villagers, it is impossible for the offence to be murder. We suggest to the learned Judge that he should carefully study the provisions of sections 299 and 300 of the Indian Penal Code. He will then find that when death is caused by an act which has been done with the intention of causing bodily injury and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, the offence is murder. We cannot, however, change the conviction into a conviction of murder. Sheodarshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot, in revision, convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal. But even if the

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and a suit was brought by Khurshed Jahan, one of the daughters for her share in the estate of Karim-ullah. That suit was compromised and a decree was passed on the basis of the compromise in 1865. According to the compromise and the decree, Khurshed Jahan relinquished her claim to the estate left by her father, and as to the property which was found by arbitrators in that case to be the property of her mother, Musammat Sibt-un-nissa, she also relinquished the rights she might acquire in that property upon the death of her mother. This relinquishment was for a consideration. As stated above, the terms of the compromise were embodied in a decree and the decree was passed as between Khurshed Jahan and her sister Kamz Fatma as also the other heirs of her father. Khurshed Jahan died. Nizam-ud-din executed a sale-deed in favour of three persons, namely, the present plaintiff Muhammad Ahmad, Muhammad Kasim and Mushtaq Ahmad. Muhammad Kasim having died, one Hashmat Ali, brought a suit in 1913, which was suit No. 24 of that year, for possession of the property sold to his father by Nizam-ud-din as also a share of the property which, he alleged, had been inherited by him from Musammat Khurshed Jahan, who was his wife. In that suit several houses were claimed. The present plaintiff, Muhammad Ahmad, was made a defendant, because he was one of the purchasers under the sale-deed executed by Nizam-ud-din. The suit was for partition of the share which was claimed by Hashmat Ali and for possession. The case was tried and, in the end, the claim of Hashmat Ali was dismissed in respect of the property purchased from Nizam-ud-din on the ground that Nizam-ud-din had previously sold his interest in the property and had, therefore, no right to convey it to the persons who obtained a sale-deed from him. As regards the property which was claimed by right of inheritance to Khurshed Jahan, the claim was dismissed on the ground that Khurshed Jahan had abandoned her rights in the property and, therefore, none passed to her heirs. Subsequently to the passing of this decree, the present suit was instituted by Muhammad Ahmad, and he claimed the share Nizam-ud-din had sold to him under the sale-deed to which we have referred above and also a share in the property in dispute which he claimed to have inherited from his

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and a suit was brought by Khurshed Jahan, one of the daughters, for her share in the estate of Karim-ullah. That suit was compromised and a decree was passed on the basis of the compromise in 1868. According to the compromise and the decree, Khurshed Jahan relinquished her claim to the estate left by her father, and as to the property which was found by arbitrators in that case to be the property of her mother, Musammat Sabi-un-nissa, she also relinquished the rights she might acquire in that property upon the death of her mother. This relinquishment was for a consideration. As stated above, the terms of the compromise were embodied in a decree and the decree was passed as between Khurshed Jahan and her sister Kaniz Fatma as also the other heirs of her father. Khurshed Jahan died. Nizam-ud-din executed a sale-deed in favour of three persons, namely, the present plaintiff Muhammad Ahmad, Muhammad Kasim and Mushtaq Ahmad. Muhammad Kasim having died, his son Hashmat Ali, brought a suit in 1912, which was suit No. 24 of that year, for possession of the property sold to his father by Nizam-ud-din as also a share of the property which, he alleged, had been inherited by him from Musammat Khurshed Jahan, who was his wife. In that suit several houses were claimed. The present plaintiff, Muhammad Ahmad, was made a defendant, because he was one of the purchasers under the sale-deed executed by Nizam-ud-din. The suit was for partition of the share which was claimed by Hashmat Ali and for possession. The case was tried and, in the end, the claim of Hashmat Ali was dismissed in respect of the property purchased from Nizam-ud-din on the ground that Nizam-ud-din had previously sold his interest in the property and had, therefore, no right to convey it to the persons who obtained a sale-deed from him. As regards the property which was claimed by right of inheritance to Khurshed Jahan, the claim was dismissed on the ground that Khurshed Jahan had abandoned her rights in the property and, therefore, none passed to her heirs. Subsequently to the passing of this decree, the present suit was instituted by Muhammad Ahmad, and he claimed the share Nizam-ud-din had sold to him under the sale-deed to which we have referred above and also a share in the property in dispute which he claimed to have inherited from his

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mother Khurshed Jahan. The present suit relates to only one of the houses claimed in the previous suit.

The court of first instance dismissed the suit on the ground of *res judicata*. It held that the matter was *res judicata* by reason of the decision in the suit brought by Hashmat Ali in 1912 and also by reason of the decree which was passed in 1868.

The lower appellate court affirmed the decree of the court of first instance holding that the matter was *res judicata* in consequence of the decision in the previous suit brought by Hashmat Ali.

This decree of the lower appellate court was affirmed by a learned Judge of this Court.

In the appeal before us it is contended that the view of the lower appellate court and of the learned Judge of this Court that the claim is barred by the rule of *res judicata* by reason of the decision in the suit of Hashmat Ali, is erroneous and that section 11 of the Code of Civil Procedure cannot be held to apply to the present case. For the decision of the question of *res judicata*, we deem it desirable to consider the case from two different aspects. The claim relates to different shares in the house which is the subject-matter of the suit. As regards one share, which is about 1/6th, the claim is based on the sale-deed executed by Nizam-ud-din. As regards the remainder of the share claimed, the suit of the plaintiff is founded on his right of inheritance as the son of Musammat Khurshed Jahan As regards the latter claim, that is, the claim based on the right of inheritance to Khurshed Jahan, the court of first instance, as we have said above, held that by reason of the decision in 1868 the plaintiff had no right and also that the matter was *res judicata*. We think that this view of the court of first instance is correct. In the suit which was decided in 1868 a decree was passed against Khurshed Jahan, the effect of which was that Khurshed Jahan was not entitled to any part of the property claimed, whether as the heir to her father or as the future heir of her mother. That decree was passed between Khurshed Jahan and Kaniz Fatma and the predecessors in title of the other defendants to the present suit. Therefore, unless the decree was tainted with fraud or was procured by undue influence, that decree will be binding on

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Khurshed Jahan and every person claiming title through her. It was not asserted, nor is it now claimed, that the decree was obtained by fraud or by undue influence. Therefore the decree is a valid decree which is binding between the parties to the present suit. Furthermore, we have to consider the effect of that decree, and it is urged that the effect of it is that Khurshed Jahan did not lose the right which she might acquire in her mother's property after her death. This question of the right of Khurshed Jahan is concluded by the decision of this Court in the case of *Mohammad Hashmat Ali* v. *Kaniz Fatima* (1). In accordance with that ruling Khurshed Jahan had lost all right in the property including the property now in suit, and the plaintiff cannot claim any share in that property as one of the heirs of Khurshed Jahan. This part of the plaintiff's claim has, therefore, been rightly dismissed, though as we shall show hereafter the view that the decision in Hashmat Ali's case operates as *res judicata* is, in our judgment, not correct.

We have now to deal with the remainder of the plaintiff's claim, that is, with that part of the claim which is based on the purchase from Nizam-ud-din. As to this part of the claim the courts below have held that inasmuch as Muhammad Ahmad, the present plaintiff, was a party to the suit brought by Hashmat Ali and that suit was dismissed on the ground that Nizam-ud-din had no title to the property which he sold, the matter has become *res judicata*. We are unable to agree with this view. The rule of *res judicata* is laid down in section 11 of the Code of Civil Procedure. Under the provisions of that section an issue which arises in a subsequent suit should not be tried by the court if the same issue has been tried in a previous suit between the same parties or persons through whom they claim, and this trial has been by a court competent to try both the suits. Now in the present suit, the matter in issue is whether the plaintiff Muhammad Ahmad has acquired by reason of his purchase from Nizam-ud-din the share which he claims in the house in dispute. In the previous suit this was not the issue before the court. The issue in that suit was whether Hashmat Ali had acquired the share which he claimed by virtue of the sale-deed

(1) (1915) 13 A.L.J., 110.

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executed in his favour by Nizam-ud-din. The issue, therefore, in the present suit was not identical with the issue which arose in the previous suit and the question of the title of Muhammad Ahmad, the present plaintiff, was never decided in that suit. It is true that he was a defendant to that suit, but a decision as between co-defendants cannot be *res judicata* under the provisions of section 11, unless it was necessary to decide an issue between the co-defendants in order to grant relief to the plaintiff. This has been held in numerous cases to which it is not necessary to refer. As between the present plaintiff and the defendants to this suit, no issue was tried in the previous suit and no issue could be tried for the purpose of determining the question of the title of Hashmat Ali. The present plaintiff does not derive title from Hashmat Ali and any decision which was arrived at between the present defendants and Hashmat Ali cannot, therefore, be binding upon the present plaintiff.

Explanation IV of section 11 was relied upon in the argument before us; but that Explanation does not, in our opinion, afford any help to the respondents. Under that Explanation, a party to a suit, who could and ought to have put forward a claim or a defence but does not do so, cannot be allowed to set up the claim or the defence in a subsequent suit. In the suit of Hashmat Ali, Muhammad Ahmad was a defendant and he could not put forward his present claim as a defence to the suit of Hashmat Ali. Therefore, in our opinion, Explanation IV has no application to the present case. It was urged that, as the suit of Hashmat Ali was a suit for partition, all parties having an interest in the property were necessary parties to the suit and the title of the defendants, who were co-sharers of the plaintiff, could be determined in that suit. No doubt, in a suit for partition where the rights of different persons interested in the property as co-sharers have to be determined and have been so determined, the decision might operate as *res judicata* although the plaintiff in the subsequent suit may have been a defendant in the previous suit. But that was not the case here. In Hashmat Ali's suit no question had to be determined as to the respective rights of Hashmat Ali and Muhammad Ahmad. Muhammad Ahmad had no defence to the claim of Hashmat Ali and he was not at all

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connected with the share which was claimed in that suit by Hashmat Ali. The decision in the previous suit did not affect any question of partition of the respective shares of Hashmat Ali and Muhammad Ahmad. In a suit of this nature, in which a co-sharer was made a defendant simply because he had an interest in the property which was claimed, a decision between the plaintiff and other defendants could not be held from any point of view to have the effect of *res judicata* as between the defendants whose title was not in issue and was never determined in the previous suit. This case very much resembles the case of *Somasundara Mudali* v. *Kulandivela Pillai* (1) which has been cited to us. The ruling in that case fully supports the view which we have expressed above.

The result is that the appeal must be dismissed as regards the share claimed as heir to Mussammat Khurshed Jahan. As regards the share claimed by virtue of the purchase from Nizamud-din, the decree of this Court and of the courts below must be set aside and the case remanded to the court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. In so far as the costs of the litigation relate to the share in regard to which the claim has been dismissed, the plaintiff must bear the costs of the defendants in all courts proportionately to the portion of the claim dismissed. As regards the remainder of the claim, costs here and hitherto will be costs in the cause.

Decree set aside and cause remanded.

FULL BENCH.

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January, 20.

Before Mr. Justice Piggott, Mr. Justice Lindsay and Mr. Justice Gokul Prasad.

IN THE MATTER OF MUHAMMAD MUZAFFAR ALI.*

Act No. II of 1899 (*Indian Stamp Act*), *schedule I, article 33—Stamp—Deed of gift—Value of property not stated.*

If in a deed of gift the value of the property dealt with is not set forth, the deed does not require any stamp, and it is not within the competence of the Collector to have the said property valued in order to assess the duty payable. If, however, the value of the property is intentionally omitted with a

* Civil Miscellaneous No. 195 of 1921.

(1) (1914) I. L. R., 38 Mad., 457.

"value" or the word 'property" immediately preceding them;

(2) whether having regard to the definition of the words "duly stamped" given in sub-section (11) of section 2 of the Act and the opening words of section 3, an instrument in which the directions of section 27 have been disregarded and the value of the property is not set forth or the property is undervalued and in consequence either no duty or a lower duty than that chargeable on the real value of the property, has been paid, is deemed to be not duly stamped, and

(3) whether if such an instrument is not duly stamped the Collector to whom it is sent under section 38 (2) can under the law require the executant to show the true value of the property in the instrument or can himself estimate the value and then charge the duty thereon.

"The only case on the point that the Chief Controlling Revenue Authority is aware of is that reported in Indian Law Reports, 8 Madras, page 453. This related to a deed of settlement mentioned in article 58, schedule 1, of the Stamp Act, where a similar phraseology is used. It was held in this case that the words "as set forth in such settlement" applied not to the interest created by the instrument but to the value set forth in the settlement.

"The case in *Empress v. Rameshar Das* (1) referred to a "conveyance", article 23, schedule 1, of the Act, where there is no room for doubt. The present question, where in a deed of gift no value whatsoever of the property is stated, has not, to the knowledge of the Chief Controlling Revenue Authority, been decided by any of the High Courts in India.

"If the deed is deemed to be not "duly stamped" there would be practical difficulties in the way of the Collector in levying the proper duty, as section 40 does not in the Board's opinion authorize the Collector to require the executant to amend the deed so as to show the consideration and other facts required

(1) (1910) I. L. R., 32 All., 171.

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IN THE MATTER OF MUHAMMAD MUZAFFAR ALI.

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(1) (1910) I. L. R., 32 All., 171.

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and not to the word "property." We are confirmed in this view by the authority quoted in the reference before us, reported in Indian Law Reports, 8 Madras, 453. In the present instance there is no "value" set forth in the said instrument. No doubt this is a contravention of section 27 of the Indian Stamp Act, and, if it be found that the omission to state the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument under section 64 of the Indian Stamp Act. The case seems to us strictly analogous to one which would arise if the executant of a deed of gift chose to set a purely nominal value on the property conveyed and to stamp the instrument accordingly. For the purposes of the Stamp Law the valuation given in the instrument would have to be accepted. If there was an intentional under-valuation, then a prosecution would protect the Government against the attempted fraud. There is no provision in the law which gives the Collector to do what he has done in the present instance, namely, to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained. Our answer, therefore, to the first question referred to us is that the instrument as it stands does not require any stamp under the Stamp Act. The second question, except in so far as it has been incidentally answered, does not arise, and the third question does not arise at all. Let this answer be returned accordingly.

Reference answered.

APPELLATE CIVIL.

1922

January, 20.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

RAMESHWAR DAYAL (PLAINTIFF) *v.* MAHARAJ CHARAN AND ANOTHER (DEFENDANTS) *

Act No. V of 1882 (Indian Easements Act), section 48—Easement—Burden on servient owner increased by action of dominant owner—Remedy of servient owner—Case must not necessarily arise in suits.

A, the owner of two adjoining houses, had a privy in one, the water from which flowed into the land of B, and as to this there existed an easement in favour of A. But A built a new privy in the second house, and connected the

* Appeal No. 61 of 1920, under section 10 of the Letters Patent

and not to the word "property." We are confirmed in this view by the authority quoted in the reference before us, reported in Indian Law Reports, 8 Madras, 453. In the present instance there is no "value" set forth in the said instrument. No doubt this is a contravention of section 27 of the Indian Stamp Act, and, if it be found that the omission to state the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument under section 64 of the Indian Stamp Act. The case seems to us strictly analogous to one which would arise if the executant of a deed of gift chose to set a purely nominal value on the property conveyed and to stamp the instrument accordingly. For the purposes of the Stamp Law the valuation given in the instrument would have to be accepted. If there was an intentional under-valuation, then a prosecution would protect the Government against the attempted fraud. There is no provision in the law authorizing the Collector to do what he has done in the present instance, namely, to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained. Our answer, therefore, to the first question referred to us is that the instrument as it stands does not require any stamp under the Stamp Act. The second question, except in so far as it has been incidentally answered, does not arise, and the third question does not arise at all. Let this answer be returned accordingly.

Reference answered.

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IN THE MATTER OF MUHAMMAD MUKARRAM ALI

APPELLATE CIVIL.

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January, 20.

Before Sir Henry Richard Meares, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

RAMESHWAR DAYAL (PLAINTIFF) *v.* MAHARAJ CHARAN AND ANOTHER (DEFENDANTS)*

Act No. V of 1882 (Indian Easements Act), section 48—Easement—Burden on servient heritage increased by action of dominant owner—Remedy of servient owner—Loss need not necessarily arise inside.

A, the owner of two adjoining houses, had a privy in one, the water from which flowed into the land of *B*, and as to this there existed an easement in favour of *A*. But *A* built a new privy in the second house, and connected the

* Appeal No. 61 of 1920, under section 10 of the Letters Patent.

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drains of the two so that the amount of water discharged over B's land was largely increased. B then blocked up the channel through which the water came on to his land.

Held, on suit by A to have this obstruction removed, that section 48 of the Indian Easements Act, 1882, did not apply, and the dominant owner did not lose his easement altogether through the action which he had taken, but that the *status quo ante* both could and should be restored. *Harris* v. *Flower and Sons* (1) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case appear clearly from the judgment under appeal, which was as follows :—

"This is a most impudent action, in fact one of the most impudent that I have ever come across. The plaintiff is the owner of two houses which adjoin one another, No. 1, which he occupies himself, and No. 2, which he has let to some tenants. Adjoining No. 2, on the eastern side thereof, is the defendant's house No. 3. The plaintiff's house No. 1 is on the west of No. 2 and the three houses stand in a line. In the north-east corner of No. 2, an old latrine existed, from which water, and also household water, passed through a channel or drain from the plaintiff's house No. 2 to the defendant's house No. 3 through the dividing wall, and the plaintiff had by prescription acquired an easement over this drain, and he made up his mind to utilize it for the purpose of his own house, No. 1, as well as for No. 2. He, having failed in an application to the municipal authorities to make a new construction, but having obviously obtained the consent of his tenants, surreptitiously constructed a latrine for the use of his own house, No. 1, which he cut off from view of the latrine in No. 2, but the water and refuse from which he connected with the channel which carried away the water from the old latrine used by the tenants of No. 2. He altered the construction of the old latrine of No. 2 apparently with the intention of creating an appearance of less user. There is no doubt from the plan that the channel or drain carrying off the water from the new latrine and the old latrine formed a junction on the plaintiff's side of the wall so that the water from both privies passed through one *pucca* drain into the defendant's house. This fact is clearly found by the first court in the

(1) (1905) 91 L. T., 816.

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Munsif's description of the drain as he saw it, and it is by implication confirmed by the judgment of the lower appellate court. If the lower appellate court has not found it as a fact, the evidence is all one way and I find as a fact, under section 103, that the new channel carrying the refuse from the two latrines when it reached the defendant's premises at No. 3 was in one channel. Both courts have found, as they were bound to find, that this was imposing an additional burden upon the servient tenement. The plaintiff had no right to construct a new latrine and to connect it with the drain in respect of which he enjoyed an easement and I am satisfied that he knew that he had no right and that he did it secretly and dishonestly. The position became unbearable to the defendant and he blocked up the channel so as to put an end to the nuisance. This was the only way in which he could prevent it. Thereupon the plaintiff had the impudence to bring this action, complaining of interference and obstruction by the defendant. The attitude taken up by the two lower courts is unintelligible to me. They have given the plaintiff a decree and directed the defendant to remove the work which he had constructed to block up this drain on condition that the plaintiff remove the additional burden which he had wrongfully imposed. This is, in substance, giving judgment in favour of a trespasser on condition that he cease his trespass. It is quite clear that the plaintiff had no case at all. The decision of both the courts is wrong. The suit must be dismissed with costs here and below. But that does not dispose of the case, because a question has been raised in the judgment of the court below as to whether the additional burden which the plaintiff had imposed upon this drain might not be materially reduced, as the person who put it there could undoubtedly have removed it, and, curiously enough, both courts have held, as a matter of fact, that this additional burden could be easily reduced by simply closing the outlet from the newly constructed privy. This finding is wholly immaterial. I am afraid neither of the courts have read the section. The section provides that "where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the

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lawful enjoyment of the easement, the easement is extinguished." The question obviously is whether the servient owner can reduce the additional burden without interfering with the enjoyment of the original easement. That section is eminently good sense. The servient owner is entitled to take his own steps to prevent a continuation of anything which constitutes a nuisance to himself. He can make an end of it. But if the additional burden is so constructed that he himself can get rid of it without interfering with the original easement, he is not allowed to be vindictive. He is confined to the necessary steps for getting rid of the burden. But, on the other hand, he is not bound to submit to the additional burden, if he cannot remove it without interfering with the original easement, and when he has to do that, the easement is by law extinguished. A dominant owner who does things of this kind takes the risk upon himself and I declare that the plaintiff's conduct in this case has extinguished this easement and that it no longer exists. I direct the first court to send a copy of this judgment to the municipality. It seems to me that steps ought to be taken by the sanitary authorities against the plaintiff."

The Hon'ble *Syed Raza Ali* for the appellant.

Munshi *Iswar Saran* and Munshi *Harnandan Prasad* for the respondents.

MEARS, C. J., and BANERJI, J. :—We are of opinion that the decree of the lower appellate court must be affirmed because we are unable to see upon what principle it has been decided that the statutory right, which the plaintiff had as owner of house No. 2 to discharge his water into the drain of the defendant's house No. 3, has been extinguished. It is true that the plaintiff was a wrong-doer when, having built on house No. 2 a new privy, he connected that up with the drain which had hitherto carried water from one privy alone in house No. 2 to house No. 3. The method by which he connected up the new privy with the old drain was, in one sense, permanent and, in another sense, not permanent, because it was capable of being blocked or cut away in a very short time. It is clear law that if a man has, for instance, a right to walk across a certain field, he does not lose that right of walking across that field merely

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because he commences to drive across it in a carriage, that is, he is not penalized and deprived of his right of using the land by walking over it because he has asserted and wrongfully exercised the right to pass over it in a carriage. The remedy open to the owner of the servient tenement is to proceed against the person who claims the wrongful enlarged user and, on his refusal to desist from his conduct, to take proceedings for an injunction. At one time it was thought that the right to ancient lights could be lost by pulling down a building which had acquired a right to lights and that the newly erected building did not have the privilege attaching to the ancient lights in the previous building. That, however, is not law to-day, and indeed on this question of abandonment of ancient rights there have been several recent cases mainly relating to light and air. The case of *Harris* v. *Flower and Sons* (1) is a case in point on the question of abandonment.

Reliance has been placed upon section 43 of the Indian Easements Act, but the question whether the permanent change referred to in this section does not mean such a change as, for instance, the construction of a building with 12 or 14 large windows in place of 3 or 4 smaller ones. That is a permanent change in the dominant heritage and the owner of the servient tenement cannot reduce the burden without interfering with what undoubtedly was the prior right of the owner of the building, namely, to have light and air to the smaller number of windows. If, therefore, whatever steps the servient tenement can take must necessarily interfere with the lawful enjoyment of the original arrangement and the additional burden cannot be reduced, then his easement is extinguished. Here, however, the burden can be reduced without difficulty to its original limits. The connection between the new privy and the drain from No. 2 that passes into No. 3 can be blocked up or cut away and the parties will, in all respects, be reverted to their original position as it was before the plaintiff wrongfully connected up the new privy with the old drain. We, therefore, think that the decree made by the court of first instance, which was affirmed by the

(1) (1905) 21 L. T., 816.

Musammat Jillo should receive in cash Rs. 1,375 and it was stated that although the appellants did not admit the validity of the mortgage which had been executed by Musammat Jillo in favour of the plaintiff, nevertheless, if Musammat Jillo was held liable on that mortgage, they undertook to pay whatever her liabilities might be. This suit was brought by the plaintiff on his mortgage and he made Musammat Jillo the first defendant and Bechan Singh and Bishnath Singh defendants Nos. 2 and 3. The main defence was that the mortgage was not genuine and that in any case it was not binding upon the property. The first court decreed the claim in part against Musammat Jillo by giving a simple money-decree against her and dismissed it as against the present appellants. The judgment of the trial court proceeded chiefly on the case of *Kamta Prasad* v *Mohan Bhagat* (1). On appeal by the plaintiff the learned Judge held that the case of *Kamta Prasad* v. *Mohan Bhagat* (1) was not applicable to the facts here, and in that opinion we agree. In that case the mortgage was executed for a different debt altogether, although both the sale and the mortgage were of the same date. Here we hold that, although the mortgage was actually executed a day after the sale, nevertheless the mortgage was a part of the consideration for the sale and must be regarded as part of the same transaction. In this view the case of *Kamta Prasad* v. *Mohan Bhagat* (1) has no application. It must be remembered that the pre-emptors in this case knew of the existence of the mortgage because it was mentioned in the sale-deed under which they pre-empted. It was open to them as prudent men to see that the mortgage was paid off before the money which they paid into court reached the hands of Musammat Jillo. We cannot see how the plaintiff who was no party to the compromise can be adversely affected by anything they chose to do behind his back. In our opinion the view taken by the court below is right. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1903) I. L. R., 26 All., 45.

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Appeal dismissed.

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decree. On the 21st of July, 1916, Kaliyan Singh applied for a final decree for sale. For some reason or other best known to himself he did not include the costs of the lower appellate court and the High Court awarded to him to be included in the final decree. The result was that the final decree as prepared was for the amount decreed thereunder and the costs of the first court or, in other words, for the decree passed by the first court and not the decree of the High Court which was the final decree in the cause and which was the only decree capable of being made final. The decree-holder Kaliyan Singh made an application on the 27th of September, 1916, to execute the final decree. No objection was taken to the execution by Dambar Singh On the other hand, on the 16th of July, 1917, he paid Rs. 1,800 and obtained further time to pay the balance. The present application in execution was made on the 30th of May, 1919, after deducting the amount so paid by Dambar Singh and adding to the balance of the amount decreed under the final decree a sum of Rs. 807 odd representing the costs of the High Court and the lower appellate court. Dambar Singh objected to the inclusion of such costs as they were not mentioned in the final decree for sale. The learned Subordinate Judge found that the amount of Rs. 807 odd claimed by the decree-holder was incorrect, but that the only amount chargeable against the property was a sum of Rs. 554-6-9, and disallowed the rest of the objection. The judgment-debtor went up in appeal, and the learned Judge of the court below has confirmed the decree of the first court. The judgment-debtor comes here in second appeal, and, besides raising the question which was put in issue in the court below, he has raised a further point that the final decree obtained by the decree-holder is not capable of execution, inasmuch as it was only the appellate decree of the High Court which was the final decree in the cause and which was the only decree which could be made final and then execution taken out In our opinion this contention of the judgment debtor raised before us for the first time is barred by the rule of *res judicata*. When the first application for execution was made he did not raise this objection. He might and ought to have raised it then, and as he did not do so, he cannot be allowed to take the same objection in

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IN THE MATTER OF TASADDUQ AHMAD KHAN SHERWANI.

Mr. Tasadduq Ahmad Khan Sherwani appeared in person.

MEARS, C. J., BANERJI and MUHAMMAD RAFIQ, JJ :—Tasadduq Ahmad Khan Sherwani has appeared before us to-day to show cause why he, being an Advocate of this Court, should not be suspended or struck off the rolls. On the 1st of July, 1921, he made a speech at Charra. That matter was investigated by the Magistrate, who on the 18th of July, 1921, convicted Mr. Sherwani under section 153A of the Indian Penal Code and sentenced him to imprisonment. The evidence as presented to the Magistrate satisfied him that an offence had been committed. Mr Sherwani, who has been called to the Bar in England and is an Advocate of this Court, did not, when before the Magistrate, make any defence. He put in a written statement but he did not criticize the witnesses or analyse the speech on which the prosecution was mainly based. He commenced today to do both. We pointed out to him that the case in the Magistrate's court could not be re-opened in these proceedings, and we referred to the decision of the Privy Council in *In the matter of Rajendra Nath Mukerji* (1). In that case there had been an inclination in this very Court to permit the Vakil's counsel to go behind the conviction in order that it might be shown that he had committed no offence in law. When this matter was argued in the Privy Council they said definitely that there could be no argument to show that the conviction was, in the circumstances, improper. Mr. Sherwani, therefore, comes before us to day as a man convicted of an offence in which he promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects. He has told us that in his view an offence under that section involves no element of moral turpitude. We disagree very strongly with this view. We think that moral turpitude is always involved in the commission of an act which comes within that section and may indeed involve an offence of the deepest moral turpitude.

We have to consider now what is the proper order which should be passed. During the argument it was indicated to Mr. Sherwani that there might come a day when he would regret

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and in lieu thereof undertook the preservation of the building, the payment of an annual sum for the performance of the ceremonies and the payment of pensions to the descendants.

It appears that the respondents mortgaged their share of the pension by means of two hypothecation bonds, on foot of which the appellant brought this suit for the recovery of his money by sale of the property mortgaged.

In their written statement the defendants pleaded, *inter alia*, that the hypothecation in respect of the amount of pension was illegal and contrary to law.

The court of first instance decreed the suit, holding that the property mortgaged was not such a pension as was contemplated by section 11 of the Pensions Act (Act XXIII of 1871) which exempted it from attachment and sale.

In appeal the District Judge reversed this decree and held that the pension was a 'political pension' and as such could not be sold or attached under section 11 of Act XXIII of 1871.

From this decree the plaintiff preferred this second appeal.

Dr. *Surendra Nath Sen* (with him Munshi *Narain Prasad Asthana*), for the appellant:—

The term 'pension' is defined in section 3 of the Pensions Act. Section 11 of the Act gives the class of pensions exempted from seizure, attachment or sequestration. *The Secretary of State for India in Council* v. *Khemchand Jeychand* (1) is the leading case in which the rules for determining the connotation and denotation of the word 'pension' have been laid down. The pension in suit was given in order to support the descendants of the saint. It was not in consideration of any past service, for Sheikh Salim Chishti did no service to Akbar, he only prayed to God. In *Balkrishna Bhau* v. *Govind Rao* (2), the Bombay case has been followed in drawing a distinction between pensions contemplated under section 11 and those granted in respect of any right, privilege, perquisite or office. In the present case the pension is in respect of a privilege. It is the respondents' privilege to be the descendants of the saint. Whatever might have been the consideration for continuing this pension by the British Government, it was certainly not political. It may be that the Government continued

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HARNAM DAS v. FAIYAZI BEGAM.

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executed by the lady alone, the second by herself, her husband and her son

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The claim was for Rs. 1418-5-0 and the plaintiff mortgagee asked for a decree enabling him to recover the debt by sale of the hypothecated property. Admittedly the question before us has to be decided with reference to the language of sections 11 and 12 of the Pensions Act (Act XXIII of 1871).

Section 11 lays down that no pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance is liable to seizure, attachment or sequestration by process of any court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such court. And section 12 enacts that assignments of pensions mentioned in section 11 are null and void.

The allowance in dispute is obviously a "pension" in the sense that it represents money payable periodically otherwise than in respect of a right, privilege, perquisite or office. The history of the fund out of which this allowance is paid and to which we shall presently refer makes this quite clear.

But the question remains whether it is a pension of any of the kinds mentioned in section 11 of the Act

The courts below have differed on this point, the first court holding that the allowance did not fall within the scope of section 11, the lower appellate court being of opinion that it did. In the well-known case of *Secretary of State for India in Council* v *Khemchand Jeychand* (1), the Bombay High Court gave a definition of the pensions described in section 11 which has been accepted by other High Courts, including our own. The case is reported in I.L.R., 4 Bom., 432, and at page 436 the learned Judge says as follows:—"In our opinion, the word "pension" in section 11 is used in its ordinary and well-known sense, *viz.*, that of a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependents."

(1) (1880) I.L.R., 4 Bom., 432.

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HARNAM DAS v. FAIYAZ BEGAM

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the tomb of the saint was a national architectural monument which it was the duty of the Government to keep in repair and a portion of the fund was definitely allotted for that purpose

Instructions were next given for the disbursement of a definite portion of the fund to meet the cost of the religious ceremonies for which the Emperor had provided.

And, lastly, a specified amount was set aside to be applied in the maintenance of the saint's descendants, regarding whom it was declared that they were pensioners of the Government entitled to draw their pensions in perpetuity from the treasury. It was laid down that they were to be registered and treated as such, and we understand that this arrangement continues to the present day and that the pension to which Faiyazi Begam is entitled as one of Salim Chishti's descendants is paid out as directed in the letter to which we have just referred.

On this statement of the facts, it is not to be doubted that the Government in 1846 came to the decision that it was just and politic to continue the grant of the land revenue which Akbar had assigned for the purposes indicated above, and we agree with the learned District Judge that the continuance of the pensions to the descendants of the saint was based upon what may fairly be called political considerations.

This being so, the pension now in dispute is one of those mentioned in section 11, and is clearly within the definition laid down by the Bombay High Court, for the grant was, without doubt, originally made either in recognition of the past services of Sheikh Salim Chishti or in acknowledgment of his particular merits.

It follows, therefore, that the assignments of the pension to the plaintiff appellant upon which he founds his claim in the present suit are null and void as provided by section 12 of the Act. The only other plea taken in the memorandum of appeal *viz*, that in any case the plaintiff should have been given a simple money decree, is unsustainable. Such a claim is barred by limitation.

We dismiss the appeal with costs to the respondent.

Appeal dismissed.

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We dismiss the appeal with costs to the respondent.

Appeal dismissed.

It is proved that Maulvi Muhammad Ali died in the month of October, 1898. He left his widow Musammat Muslima Bibi, two sons Muhammad Hasan and Muhammad Zabur and four daughters Musammat Kulsum, Musammat Makki, Musammat Fatima and Musammat Ruqiya.

In the month of April, 1908, the estate belonging to Maulvi Muhammad Ali was taken over by the Court of Wards. It appears that an application was made to the Court of Wards Some of the heirs of Muhammad Ali were of full age at the time the application was made, but two of the daughters, Musammat Fatima and Musammat Ruqiya, were still minors. Musammat Kulsum, one of the daughters whose names have been mentioned, declined to join in the application.

The result of all this was that the Court of Wards took over the property of all the heirs of Muhammad Ali except Musammat Kulsum.

After the notification was issued announcing the taking over of the property by the Court of Wards, a further notice was issued under section 16 of the old Court of Wards Act, (U. P. Act No III of 1899, calling on all persons who had claims against the estate of Muhammad Ali to notify them to the Collector within six months from the date of notification.

It is apparent from the record in this case that Dwarka Prasad, who is now represented by his son, made no claim in respect of the mortgage-debt now in suit, within the period prescribed by the notification just mentioned. There is on the record a certain petition which appears to have been presented by Dwarka Prasad to the Collector on the 27th of April, 1910, in which he asserts that he had notified his claim to the Court of Wards. There is nothing, however, in this petition to show on what date this claim of his was brought to the notice of the Court of Wards.

The suit with which we are now concerned was instituted on the 16th of April, 1917, and in the plaint it was stated that the original document of mortgage was not forthcoming and that, therefore, the plaintiff was pursuing his claim on a certified copy of the document.

In this suit the defendants impleaded were (1) the Collector of Jaunpur as Manager of the Court of Wards of the estate of

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April, 1895, and the first month of Jeth which fell thereafter. It is clear of course that the interest amounts under the deed to Rs. 240 per annum. It is also clear that the parties agreed that this sum of Rs. 240 should be payable every Jeth Puranmashi, but obviously the sum which was payable on the first Jeth Puranmashi after the date of execution of the instrument was very much less than Rs 240. We are inclined to hold that the document means that interest was to be payable in every Jeth and that consequently there was an obligation on the mortgagor to pay in the month of Jeth, which fell about June, 1895, such interest as had accrued due by that time Thereafter, there was to be payable at each Jeth Puranmashi a sum of Rs. 240 representing the interest of 12 months. In this view, it being admitted that no interest on the debt was ever paid, there was a default about the month of June, 1895. In any case it is quite clear that there was default in the month of June, 1896.

On the face of it, therefore, any suit on this mortgage was time-barred at the time the present case was brought into court. We are unable to distinguish this case from the case which was before the Full Bench in *Gaya Din* v. *Jhamman Lal* (1). That case has been followed in another case, namely, *Pancham* v. *Ansar Husain* (2). According to those rulings limitation in the case of a document like this begins to run from the date of the first default. The plaintiff sought, however, to avoid the bar of limitation by putting forward a document which according to his case amounted to an acknowledgment which under the terms of section 19 of the Limitation Act saved the claim.

The document is marked Ex. A on the record and we have now to state how it came into court. It was not a document which was in the plaintiff's possession at the time the suit was brought, nor indeed was any acknowledgment pleaded in the plaint by way of saving the bar of limitation.

After the suit had been instituted an application was made on behalf of the plaintiff asking the court to direct the Collector as Manager of the Court of Wards to produce a number of documents out of the Court of Wards file relating to the estate of Maulvi Muhammad Ali. In accordance with the summons

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In appeal here it has been argued that the document was inadmissible in evidence and that the court below was wrong in overruling the plea which was put forward by the Collector under the provisions of section 124 of the Evidence Act.

After careful consideration of this argument we think the appellant is entitled to succeed and that the opinion of the Subordinate Judge in this matter was not correct.

In dealing with this plea the learned Subordinate Judge referred to two rulings, *Venkatachella Chettiar* v. *Sampathu Chettiar* (1) and *Jadobram Dey* v. *Bulloram Dey* (2). On the strength of these rulings he held that statements made under process of law cannot be said to be made in official confidence within the meaning of that expression as used in section 124 of the Evidence Act.

It is quite clear on a proper construction of this section that it is for the court to decide whether or not a particular document for which privilege is claimed is a communication made to a public officer in official confidence. If the court decides that it was so made then it has no authority to compel the public officer to produce it, for according to the section the public officer himself is the sole judge as to whether its disclosure would or would not be in the public interests.

The two cases upon which the learned Subordinate Judge relied for his opinion dealt with returns made by persons under the Income Tax Act. In other words, they were declarations of income which were filed by parties for the purpose of enabling the officer concerned to assess the proper amount of income-tax. It was laid down in the Madras case to which we have referred that "it would be difficult to say that documents produced or statements made under process of law could be said to be made in official confidence."

Assuming that this statement of the law is correct, we are of opinion that the proposition therein so widely laid down cannot be applied to the facts of the present case. There is nothing whatever to show that this statement contained in

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It follows from this that if this document is excluded from consideration the suit must fail, for admittedly there is no other evidence upon which it would be possible to hold that the bar of limitation was removed.

It is not necessary for us to enter into other matters in which, it appears to us, the court below has gone wrong. We may say, however, that the evidence on the record does not satisfy us that this statement attributed to Muhammad Hasan, was made before the month of June, 1908. The whole evidence on this point is quite indefinite and we are asked to make a series of presumptions which, in the circumstances, we cannot possibly make. A plaintiff who is prosecuting a suit which is on the face of it barred by limitation, and who is trying to bring it within limitation by proving an acknowledgment under section 19 which gives him a fresh period, must give cogent proof of his allegations, and in the present case we do not find that this requirement has been complied with. Another matter, which we may mention here, is that the lower court was obviously wrong in using this acknowledgment against any one but Muhammad Hasan himself; section 19 of the Limitation Act is clear on the point. Notwithstanding this, the learned Subordinate Judge has given a decree against all the heirs of Maulvi Muhammad Ali except his three daughters, Musammat Makki, Musammat Fatima and Musammat Ruqiya

We need not deal with any of the other matters which were argued before us. It is sufficient for us to say that the claim was time barred and the suit ought to have been dismissed. We, therefore, allow this appeal, set aside the decree of the court below and direct that the plaintiff's claim stand dismissed with costs in both courts

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Appeal allowed.

PRIVY COUNCIL.

CHET RAM AND OTHERS (DEFENDANTS) v. RAM SINGH AND OTHERS (PLAINTIFFS).

*P. C.
1922
April, 10.

[On appeal from the High Court at Allahabad.]

Hindu Law—Joint family property—Alienation—Antecedent debt—Usufructuary mortgage—Sale of equity to mortgagee—Pious obligation to pay grandfather's debts.

A member of a Mitakshara joint family in 1904 gave a usufructuary mortgage over part of the ancestral property to secure an advance then obtained by him. In 1907 he sold the equity of redemption to the mortgagee, the mortgage being discharged out of the price and a balance paid to the mortgagor. There was no legal necessity for either transaction, but it was not proved that the money was applied by the alienor to immoral purposes. After his death, but during the life of his sons, his grandsons sued to recover the property.

Held that there was no such antecedent debt as made either the mortgage or the sale binding upon the grandsons, and that they were not, as a consideration to recovering the property, under a pious duty to repay to the vendees the money received by their grandfather. *Sahu Ram Chandra* v. *Bhup Singh* (1), *Lachhman Prasad* v. *Sarnam Singh* (2) and *Jogi Das* v. *Ganga Ram*, (3) followed.

Judgment of the High Court affirmed.

APPEAL (No. 62 of 1921), from a judgment and decree of the High Court (March 11th, 1919) varying a decree of the Subordinate Judge of Meerut (March 31st, 1916).

The suit was brought in 1915 by the respondents to recover possession of certain immovable property. The property in suit had been ancestral property of a Hindu (Mitakshara) joint family, consisting of Amar Singh (till his death in 1909), his two sons (who were made formal defendants), and his grandsons, the respondents. In 1904 Amar Singh executed a usufructuary mortgage for ten years over part of the property in favour of the principal defendants to secure an advance of Rs. 8,000 then made to Amar Singh. In 1907 Amar Singh sold to the mortgagees the equity of redemption for Rs. 13,500, of which Rs. 8,000 was applied to discharging the mortgage debt and Rs. 5,500 was paid to Amar Singh.

The facts more fully appear from the judgment.

Present:—Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, and MR. AMEER ALI.

(1) (1917) I. L. R., 39 All., 437; L. R., 44 I. A., 126.
(2) (1917) I. L. R., 39 All., 500; L. R., 44 I. A., 168.
(3) (1917) 21 C. W. N., 957.

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CHET RAM v. RAM SINGH.

The Subordinate Judge found that there was no legal necessity for incurring the mortgage or for selling the equity. He, however, took the view that under the Mitakshara law the debt was an "antecedent debt" for which Amar Singh was competent to alienate the joint property. As regards the Rs. 5,500 received upon the sale, the learned Judge held that the plaintiffs had failed to prove that it was applied to immoral purposes, and that consequently by Hindu law they were under a religious duty to pay that sum to the defendants. He made a decree dismissing the claim as to a 10/27 share of the property, (viz. the proportion of Rs. 8,000 to Rs. 13,500); as to the remaining 11/27, the decree set aside the sale and provided that the plaintiffs should have possession if within three months they paid Rs. 5,500 to the vendees, but that otherwise their claim to that share should also be dismissed.

Upon appeal to the High Court the decree was varied. The learned Judges (KNOX and LINDSAY, JJ.) dealing first with the question of antecedent debt, referred to the judgment of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (1) and said:—"In the present case the sum of Rs. 8,000 was borrowed by Amar Singh on the security of the joint estate. There is nothing to show that the money was advanced on his personal credit; on the contrary, the mortgage was a usufructuary mortgage under which Amar Singh was under no personal liability. Applying, therefore, the test laid down in the case mentioned we find that the mortgage of 1904 cannot be considered to be an antecedent debt." Dealing with the question of pious obligation, they held that there was in Hindu law no obligation upon grandsons to pay the debts of their grandfather while their own fathers were living. In support of that view they referred to Vijnaneswara's Commentary on Yajnavalkya II, 50. It being conceded, however, that Rs. 1,000 had been applied to discharge a personal debt of Amar Singh to a Bank at Meerut, it was held that the plaintiffs were bound to pay that amount as a condition to recovering the property. The appeal to the High Court is reported at I. L. R., 41 All., 529. The defendants (vendees) appealed to the Privy Council: there was no appeal by the plaintiffs as to the Rs. 1,000.

1922. February 17th, March 10th, 13th.—*DeGruyther*, K. C., and *Hyam*, for the appellants:—Even if as the result of the

(1) (1917) I. L. R., 39 All., 467: L. R., 44 I. A., 126.

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decision of the Board in *Saku Ram Chandra* v. *Bhup Singh* (1), there was no antecedent debt and consequently the sale cannot be set aside, yet the plaintiffs were not entitled to recover the property without repayment. The above decision did not affect the principle that the creditor could bring ancestral estate to sale in execution and bind the shares both of sons and grandsons. That principle is well established; *Muddun Thakoor* v. *Kantoo Lall* (2), *Bhagbut Pershad Singh* v. *Girja Koer* (3), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4), *Nanomi Babuasin* v. *Modhun Mohun* (5), *Badri Prasad* v. *Madan Lal* (6), *Ramasami Nadan* v *Ulaganatha Goundan* (7), *Govind* v. *Sakharam* (8), Mayne's Hindu Law, paras. 301, 312, 321. This principle rests upon the pious obligation of sons and grandsons to discharge their father's and grand-father's debts out of the assets. The texts set out in Sarkar's Vyvastha Chandrika, Vol. 1, pp. 238—240, show that grandsons are bound as well as sons, and although their fathers are living. That the obligation extends to grandsons is specifically stated in the passage from the judgment of WESTROPP, C. J., approved by the Board in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (4). This question was not touched by the above cited decision of the Board in 1917, or by *Lachhman Prasad* v. *Sarnam Singh* (9), or *Jogi Das* v. *Ganga Ram* (10), which followed it. The debt not being shown to have been incurred for immoral purposes, it must be assumed that the grandsons got the benefit and they cannot in equity set aside the sale without refunding the money; *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (11). Further, the mortgage was an antecedent debt which made the sale binding. It is submitted on this point that *Saku Ram Chandra* v. *Bhup Singh* (1), and the two cases which followed it, are limited to establishing that an advance made is not an antecedent debt in respect of a mortgage which it was then intended should be given to

(1) (1917) I. L. R., 39 All., 427 : L. R., 44 I. A., 126.
(2) (1874) 14 Beng. L. R., 187 : L. R., 1 I. A., 321.
(3) (1888) I. L. R., 15 Calc., 717 : L. R., 15 I. A., 99.
(4) (1879) I. L. R., 5 Calc., 148 : L. R., 6 I. A., 88.
(5) (1885) I. L. R., 13 Calc., 21 : L. R., 13 I. A., 1.
(6) (1893) I. L. R., 15 All., 75 (F. B.).
(7) (1898) I. L. R., 22 Mad., 49 (F. B.).
(8) (1904) I. L. R., 28 Bom., 333.
(9) (1917) I. L. R., 39 All., 500 : L. R., 44 I. A., 163.
(10) (1917) 21 C. W. N., 957 (P. C.)
(11) (1868) 6 W. R., C. R., 71.

sacred. The view has been taken by the High Court at Madras; *Veda Venkanna v. Sreenivasa Deekshitulu* (1), *Arumugham Chetty v. Muthu Koundan* (2), *Kandasami Goundan v. Kuppu Mooppan* (3). In *Badri Prasad v. Madan Lal* (4), which was referred to by Sir JOHN STANLEY, C.J., in his judgment approved by the Board in *Sahu Ram Chandra's case* (5), the antecedent debt was one secured on the family property. Although the mortgage was usufructuary the property could not be recovered without paying the debt.

Dunne, K. C., and *Dube*, for the respondents:—The judgment of the Board in *Sahu Ram Chandra* v. *Bhup Singh* (5) is conclusive that in this there was no such antecedent debt as would support the sale. There was no debt owing by Amar Singh at the date of the sale, having regard to the terms of the mortgage. The argument as to the pious obligation of the sons was advanced in the case mentioned and rejected. But in any case the High Court rightly held that there was no pious obligation on the grandsons while their fathers were living. (They were stopped.)

April, 10th. The judgment of their Lordships was delivered by Lord SHAW.

This is an appeal from a decree, dated the 11th of March, 1919, of the High Court of Judicature at Allahabad, which varied a decree, dated the 31st of March, 1916.

The suit was brought on the 24th of July, 1915, in the court of the Subordinate Judge of Meerut. The plaintiffs were minors and sued through their guardian, Ram Singh.

No pedigree need be given. It is sufficient to bear in mind that Amar Singh succeeded on the death of his father, Nawal Singh, to a half of Nawal's property. This half, thus ancestral family property, was, at the date of the mortgage and sale after mentioned, the joint family property of Amar, of his two sons, Bharat and Kehar, and of Ram, son of Bharat, and Mahabir and Gajraj, the two sons of Kehar. This ancestral joint undivided estate was thus owned by two sons and three grandsons. The two sons as well as the three grandsons, the plaintiffs, were

(1) (1917) I. L. R., 41 Mad., 136. (3) (1919) I. L. R., 43 Mad., 421.
(2) (1919) I. L. R., 42 Mad., 711 (F. B.) (4) (1893) I. L. R., 15 All., 75 (F. B.)
(5) (1917) I. L. R., 39 All., 487: L. R., 44 I. A., 126.

1922

CHET RAM v. RAM SINGH.

all alive at the date of the mortgage and sale after mentioned, and they are still alive. Amar, the grandfather, died in 1909.

On the 23rd of March, 1904, Amar executed a mortgage over this family property for Rs. 8,000. It is a fact beyond dispute that Amar, whom the Subordinate Judge finds to have been a man of extravagant habits, not leading a moral life and addicted to drink, incurred this debt for his own personal purposes. It was, with the doubtful exception of Rs. 1,000 to be presently referred to, neither incurred nor used for family purposes or necessity, nor was it an antecedent debt. It was scheduled upon the mortgage as "Received in cash at the village before registration, Rs. 1,000. Cash at the time of registration, Rs. 7,000." (As to the Rs. 1,000, the High Court has allowed it with certain interest as a good charge, and the respondents do not present any cross appeal. The item may accordingly be dismissed from further consideration.)

In short, Amar treated the property as his own and violated the well-known rule of the Mitakshara, under which, as clearly laid down in *Sahu Ram Chandra* v. *Bhup Singh*(1), joint family property "cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners. Any deed of gift, sale or mortgage granted by one coparcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it, and it stands entirely free of it." This law has been, in substance, repeated again and again. It is in entire accord with the ancient texts. It was accepted law long prior to *Sahu Ram Chandra's case*—a convenient instance being Lord WATSON'S judgment in *Madho Parshad* v. *Mehrban Singh* (2); and it has been followed by the cases after referred to.

The exception to this rule is where the consideration for the transaction is an antecedent debt of the vendor or mortgagor. And the judgment of Sir JOHN STANLEY on this part of the law in *Chandradeo Singh* v. *Mata Prasad* (3), and expressly affirmed by this Board in *Sahu Ram Chandra's case* (1) appears to this Board exactly to cover the present case.

(1) (1917) I. L. R., 39 All., 437; L. R., 44 I. A., 126.
(2) (1890) I. L. R., 18 Calc., 157; L. R., 17 I. A., 194.
(3) (1906) I. L. R., 31 All., 176 (196).

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Before passing from the mortgage, however, their Lordships desire to note that it was by its terms, a usufructuary mortgage, and was for the period of ten years running from its date—that is, from 1897 to 1917. It is stipulated that, possession and occupation being given to the mortgagee :- "The profits of the mortgaged lands will be equal to the interest of the amount of mortgage until redemption of the mortgage . . . Whenever, after the expiry of ten years, I, the executant, shall have paid the entire amount of mortgage in a lump sum to the mortgagee, I shall get the property mortgaged by me redeemed. I shall not have power to redeem the mortgage before the expiry of ten years."

Apparently, however, the profuse scale of the father's personal expenditure continued, and he was again willing to put, or attempt to put, in jeopardy the joint family property. Notwithstanding the ten years' provision of the usufructuary mortgage, he (Amar Singh) within three years from its date—namely, on the 16th of July, 1907—sold his equity of redemption in the property to the mortgagees for Rs 13,500. In the specification of the consideration the "allowed credit" to the vendees for the Rs 8,400 obtained from the mortgagee, and the balance was put down "Received in cash at the time of the registration."

Beyond all question with regard to this last sale, here was a sale in flat defiance of the law. For what is not pretended to be any family purpose or necessity, he had improperly and illegally sold the family property; and such a sale cannot stand.

This case is singularly clear because it is not affected by other considerations such as the property having been publicly sold: there are no rights of execution creditors or auction purchasers to be considered.

But an argument was submitted, supported by the judgment of the Subordinate Judge, to the effect that, although by the rules of the Mitakshara law a mortgage is at its date an invalid deed in so far as purporting to encumber the joint family property, yet when it purports to become the consideration for a sale it then becomes a just and a legal consideration on the principle of "antecedent debt." The family property could not be affected by such an invalid mortgage, but it could be sold next year or next day to the mortgagee for an "antecedent" debt—

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namely, the mortgage debt itself! Thus by turning the "antecedent debt" simply into a debt "antecedent" to the sale, the whole doctrine of antecedent debt is reduced *ad absurdum* the principle of the Mitakshara law is circumvented, and the rights of the junior members of a Hindu family are no longer protected but can be easily destroyed. Their Lordships cannot hold that this is in accordance with law. The views of the Board have been expressed quite recently in *Sahu Ram Chandra's case* (1) and in *Jogi Das* v. *Ganga Ram* (2), about to be referred to.

As to the matter of the antecedency of debts, it is clear beyond question that the antecedency is antecedency to the mortgage itself. And it is more than that—it is disconnection with the mortgage in fact as well as in time. In no other way can the law of Indian joint family property protect itself against being undermined.

These sentences from *Sahu Ram Chandra's case* (3) may be quoted as particularly applicable to the circumstances of this appeal. "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply only, to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, namely, that no manager, guardian or trustee can be entitled for

(1) (1917) I. L. R., 39 All., 487; L. R., 44 I. A., 126.
(2) (1917) 21 C. W. N., 957 (P. C.).
(3) (1917) I. L. R., 39 All., 487, (447); L. R., 44 I. A., 126 (134).

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his own purposes to dispose of the estate which is under his charge."

The law thus laid down was followed in *Lachhman Prasad* v. *Sarnam Singh* (1). Further, to employ the résumé made by the learned Judges of the High Court—"The point was again considered by their Lordships of the Privy Council in the case of *Jogi Das* v. *Ganga Ram* (2), where Lord HOBHOUSE interpreted the judgment in the case of *Sahu Ram Chandra* v. *Bhup Singh* (3) as follows:—'In that case it was laid down in effect that joint property could not be alienated as against co-sharers by way of mortgage or otherwise, except for necessity, or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage'."

This body of law is rightly followed and applied by the High Court, and their Lordships fully approve of the judgment delivered.

A separate and protracted argument was laid before the Board to the effect that the respondents, the grandsons of Amar Singh, are not entitled without making repayment to have their property against his invalid proceedings by reason of "pious obligation." It is sufficient to say that no such doctrine can be invoked in the circumstances of the present case. In *Sahu Ram Chandra's case* (3) a similar appeal to the "pious obligation" doctrine was made during the father's life-time, and the point was thus dealt with:—"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, must fail; and the simplest of all reasons may be assigned for this—namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's

(1) (1917) I. L. R., 39 All., 500. (2) (1917) 21 C. W. N., 957 (P.C.)
(3) (1917) I. L. R., 39 All., 437 (444); L. R., 44 I. A., 123 (131).

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debts is one thing, and the validity of a mortgage over the joint estate is quite another thing."

In the present case the doctrine is invoked against grandsons and in the life-time of sons. Nothing more need be said. The invocation of the doctrine entirely fails.

Their Lordships will humbly advise His Majesty that the appeal should be refused with costs.

Solicitors for the appellants: *Barrow, Rogers* and *Nevill.*

Solicitor for the respondents: *H. S. L. Polak.*

APPELLATE CIVIL.

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February, 1.

Before Mr Justice Gokul Prasad and Mr. Justice Stuart.

MANPAL SINGH (DEFENDANT) *v.* RAJA PARTAB SINGH AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22—*Occupancy rights created under Act No. X of* 1859—*Tenant succeeded by widow in* 1868—*Widow's death after passing of Act No. II of* 1901—*Succession.*

The holder of an occupancy tenancy died about the year 1868. After his death, his widow took possession of the holding and remained in possession until 1903, when she made a *gift* of it. The widow died in 1915, and the reversioners then sued the donees to recover possession.

Held that the widow did not succeed to a heritable estate, but acquired by virtue of possession an estate in herself. Succession to this estate was governed by the present Agra Tenancy Act of 1901, and the plaintiffs, not being sharers in the cultivation at the date of the death of the widow, were not entitled to succeed.

THE facts of this case are fully set forth in the judgment of GOKUL PRASAD, J.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

GOKUL PRASAD, J.:—This appeal arises out of a suit for possession of a certain cultivatory holding. The plaintiffs came to court on the allegations that one Nanhe Singh, who owned a large area of occupancy holding and fixed rate holding, died about 1868, that after him his widow Musammat Nankai entered into possession of the occupancy holding as a life-tenant with limited rights only, that she made a *gift* of the said property to Manpal

* Second Appeal No. 600 of 1920, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 9th of February, 1920, confirming a decree of Abdul Halim, Subordinate Judge of Mirzapur, dated the 19th of August, 1918.

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Singh, defendant, and his wife, in the year 1893, that she being only a life-tenant had no right to make the gift, that the gift was, therefore, invalid, that she died in the year 1915 and that thereupon they, the plaintiffs, now sued as her next reversioners for possession which was postponed till her death. The original tenant Nathe Singh having died before the Tenancy Act of 1873 was passed, the question is, was there a succession to his holding at the time of his death and, if so, to whom? We have not been able to find any provision of law regulating the devolution of succession to an occupancy tenancy at that time. The right of an occupancy tenant was first created by Act X of 1859. Section 6 of that Act runs as follows:—"Every ryot, who has cultivated or held land for a period of twelve years, has a right of occupancy in the land so cultivated or held by him, whether it be held under *pottah* or not, so long as he pays the rent payable on account of the same: but this rule does not apply to khomar neejjote, or seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year by a ryot having a right of occupancy. The holding of the father, or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section."

In the case of *Ajoodhya Pershad* v. *Mussamut Imam Bandi Begum* (1), a Full Bench of the Calcutta High Court held that such a right was not transferable, and Sir BARNES PEACOCK stated in his judgment:—"Speaking for myself, I am not at all sure that a right of occupancy gained under section 6, Act X of 1859, is necessarily heritable."

In *Narendra Narayan Roy Chowdhry* v. *Ishan Chandra Sen* (2) a Full Bench of the Calcutta High Court decided that such a right was not transferable.

In *Doorga Pershad* v. *Doochur Pershad and others* (3) this Court held that the ordinary Hindu law did not of necessity apply to the succession of an occupancy holding, and appeared to lay down a principle that in certain circumstances a co-cultivator, closely related to the occupancy tenant, such as a son *et cetera*,

(1) (1867) 7 W. R., C. R., 523. (2) (1874) 13 B. L. R., 274.
(3) N.-W. P., H. C. Rep., (1863), p. 168.

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might succeed to the holding. At page 184 they are reported to have said:—"It is assumed in the judgment appealed from, that upon the death of a ryot having a right of occupancy, his heirs, however remote, may claim to succeed to his holding as their inheritance. No authority is cited, except that the Hindu law of inheritance is referred to, and the defendants being found to be heirs by Hindu law are declared entitled to the right of occupancy by inheritance. On the death of a ryot having a right of occupancy his son or other immediate heir residing with him in the village usually succeeds. Remote heirs residing elsewhere and coming to the village after an interval have not been allowed to take possession of his holding as a part of their inheritance. In the case, the grandson of the ryot (his daughter's son) who, it is stated, would presumably inherit his own father's cultivation, was not allowed to succeed to the holding of his grandfather. It may be inferred that he resided with his father elsewhere than in the deceased ryot's village."

In a subsequent decision, *Musumat Pem Koer* v *Upper Balee Singh* (1), the same Court held that it was not correct to say that the ordinary Hindu law would apply. The learned Judges in their judgment had referred to paragraph 128 of the 'Directions to Settlement Officers'. Those observations referred to tenants at fixed rates and not to tenants in general.

However, leaving this matter aside, it is quite clear that we cannot in the face of these authorities come to the conclusion that the right of an occupancy tenant devolved according to the ordinary rule of succession of Hindu law as in the case of other estate. Until the passing of Act XVIII of 1873 there was no rule of succession provided for occupancy holdings. They were apparently governed by custom, which varied in different villages. No custom is found here.

Under these circumstances there are two ways of looking at the case. The point, in short, is, what was the nature of the right which Musammat Naukai obtained by virtue of taking possession of the occupancy tenancy? After the death of her husband she continued in undisturbed possession thereof up to the time of her death. If she was in possession, as alleged by the plaintiffs, by inheritance, the defendants could acquire no rights from her

(1) N.-W. P., H. C. Rep., (1870), p. 86.

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by virtue of the gift in their favour because she had no such rights to pass, and, further, the plaintiffs, whose rights of enjoyment could be said at the best to have been postponed during her life, could not have possibly been co-sharers in the cultivation of the sir, as they were not in existence at the time of her husband's death, and, therefore, their suit was bound to fail. If, on the other hand, by such continuous possession she obtained an occupancy right in herself, then the succession opened on her death and the plaintiffs did not fulfil the conditions prescribed under section 22 of the Tenancy Act now in force to come in as her heirs. In either view of the case the plaintiffs' claim was bound to fail and the courts below have erred in decreeing the claim. I would, therefore, allow the appeal and modify the decrees of the courts below by decreeing the plaintiffs' claim only in respect of the fixed-rate tenancy and dismissing the rest of the claim with proportionate costs.

STUART, J.:—I concur in the order proposed. I have to add very little to it. As I understand the law, the right of an occupancy tenant was created for the first time by the provisions of section 6 of Act X of 1859, except under special customs, which are not shown to have existed in the village in which the land in dispute is situated. In order to decide the question whether on the death of an occupancy tenant whose rights were created by Act X of 1859 and who died before Act XVIII of 1873 came into force, such rights were heritable or not, it would appear to be necessary only to examine the words of section 6, and after examining these words to decide whether this section created in the occupancy tenant an estate such as is known to the law of England as 'an estate of inheritance'. Apart from anything which may have been decided by this Court, it appears to me that on the wording of the section it is impossible to hold that an 'estate of inheritance' was so created. An occupancy tenant under that section obtained, in my opinion, a non-heritable right to retain the cultivation of his occupancy holding so long as he paid his rent, and such right was created by the Act of 1859 for the first time, where it had not previously existed by custom. Act XVIII of 1873 undoubtedly created an estate of inheritance, but I agree with the view that was taken as long ago as 1876 by Sir BARNES PEACOCK that the right created by Act X of 1859 was

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neither transferable nor heritable. So when Nanhe Singh died, the rights of occupancy came to an end. His widow Nankai, being permitted to continue cultivation of the holding after her husband's death, acquired in her own right after twelve years the right of an occupancy tenant. Now that she is dead, the question is how is succession to her g erned? It is clearly governed by the provisions of section 22 of the present Tenancy Act (Local Act No II of 1901), and the plaintiffs cannot claim the right to succeed her, as they did not (whatever be their title in other respects) share in the cultivation of the holding at the time of her death.

BY THE COURT.—The order of the Court is that the appeal is allowed and the decrees of the courts below are modified, the claim of the plaintiffs to the occupancy holding only being dismissed. Costs are to be in proportion to failure and success.

Appeal allowed.

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February, 6.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BHATELE CHUNNI LAL (PLAINTIFF) *v.* CHAKARPAN AND OTHERS (DEFENDANTS)*.

General rules for Subordinate Civil Courts, Chapter V, *rule* 4—*Execution of decree—Sale of property by Civil Court as non-ancestral—Subsequent suit to set aside sale on the plea that the property sold was in fact ancestral.*

Where immovable property is sold by a Civil Court as non-ancestral, the judgment-debtor having knowledge of the sale, and opportunity, if so advised, to raise the question of the nature of the property in execution, he cannot thereafter sue to set aside the sale upon the ground that the property was in fact ancestral and should not have been sold by the Civil Court. *Behari Singh* v. *Mukat Singh* (1) and *Dalip Narain Singh* v. *Parmaoti Bibi* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Suren dra Nath Sen*, for the appellant.

Munshi *Baleshwari Prasad*, for the respondents.

PIGGOTT and WALSH, JJ.:—The object of the suit out of which this appeal arises was to set aside an auction sale, held on the 20th of July, 1915, of property belonging to the plaintiff. The defendants impleaded were the auction-purchaser and the

* First Appeal No. 299 of 1919, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 19th of May, 1919.

(1) (1905) I. L. R., 28 All., 273. (2) (1919) I. L. R., 42 All., 58.

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decree-holders at whose instance the property was sold. The plaintiff came into court with serious allegations of fraud against the defendants. We must not be understood to hold that on the allegations made the suit was not maintainable. As a matter of fact, however there was no evidence worth discussing of any fraud on the part of the defendants. On the contrary, it was clear that the plaintiff had knowledge of the execution proceedings and an opportunity of being heard in the execution court. Practically all that was really contended in the court below was that the property in suit, being in fact ancestral property, had been wrongly sold as non-ancestral. In the first place, the plaintiff failed to satisfy the court below on the question of fact as to the nature, whether ancestral or non-ancestral of the property. The oral evidence on which he relies we could not treat as sufficient in face of the contrary finding of the court below. The point really argued before us has been that the trial court ought to have admitted additional documentary evidence on this point, and the evidence is tendered before us for admission to-day. We think that no good case is made out for the admission of fresh evidence in face of the reasons given by the trial court in its judgment. In any case, however, the question sought to be raised could not influence the decision of the suit. It is quite clear that in the execution court the property in question was treated as non-ancestral to the knowledge of the present plaintiff, then judgment-debtor. It was in fact described by him as non-ancestral in a written pleading which he entered before the execution court. The court was therefore within its jurisdiction in putting up for sale property which, on the admission of the parties concerned before it, was rightly described as non-ancestral. If that description was in fact a mistaken description, the plaintiff is to blame, and there is no proof on this record that he has really suffered substantial injury. On the principles laid down by this Court in the case of *Behari Singh* v. *Mukut Singh* (1), and recently re-affirmed in the case of *Dalip Narain Singh* v. *Parmaoti Bibi* (2), this suit could not succeed, even if by the admission of further evidence the plaintiff was to secure a finding that the property in suit was after all ancestral, although

(1) (1905) I. L. R., 28 All., 273 (2) (1919) I. L. R., 42 All., 55.

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the plaintiff had allowed it to be sold as non-ancestral. This appeal fails and we dismiss it accordingly with costs.

Appeal dismissed.

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February, 9.

Before Mr. Justice Piggott and Mr. Justice Walsh

SURAJ PRASAD (DEFENDANT) *v.* MAKHAN LAL AND ANOTHER (PLAINTIFFS) AND MUSAMMAT KAMLA DEVI (DEFENDANT.)*

Hindu law—Joint Hindu family—Mortgage by father to pay off prior mortgage executed before the birth of his only son—Antecedent debt—Legal necessity.

In 1906, a Hindu who had a son living, executed a mortgage of the joint family property for Rs. 8,000. Of this sum Rs. 3,100 went to pay off a prior mortgage on the property executed by the father before his son was born and Rs. 800 was due to the prior mortgagee on a promissory note. The remainder was paid in cash, and it was found that this portion of the mortgage debt was undoubtedly borrowed for legal necessity. After the death of the father, the mortgagees sued the son and other persons interested, or supposed to be interested, in the mortgaged property on their mortgage.

Held that it was not open to the son to plead that there was no legal necessity to support that part of the mortgage debt which was incurred for the purpose of paying off the prior mortgage. *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Ram Sarup* v. *Bharat Singh* (2) discussed. *Chuttan Lal* v. *Kallu* (3) referred to.

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Munshi *Narain Prasad Ashthana*, for the appellant.

Munshi *Gulzari Lal* and Babu *Piari Lal Banerji*, for the respondents.

PIGGOTT, J.—The suit out of which this appeal arises was brought to enforce a mortgage-deed of the 7th of June, 1906. The executants were Reoti Prasad, his step-mother Musammat Man Kunwar and his brother's widow Musammat Hukam Kunwar. It is fully established, and has been practically admitted before us in argument, that the whole of the property affected by the mortgage was the property of Reoti Prasad. The ladies concerned were simply living with him as female members of a joint undivided Hindu family in the enjoyment of their right

* First Appeal No. 242 of 1919, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 13th of December, 1918.

(1) (1917) I. L. R., 39 All., 437. (2 (1921) I. L. R., 43 All., 703.
(3) (1919) I. L. R., 38 All., 283.

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of maintenance. It so happened, however, that their names had been shown in the village papers in respect of fractional shares in the property. On the case as admitted before us, we must take it that these entries had in fact been made as a mere formality out of consideration for the feelings of the two widows, and that the property was Reoti Prasad's. The consequence, however, was that the mortgagee, before entering into the transaction, insisted upon execution of the deed by the two widows as well as by Reoti Prasad. On the date of the institution of this suit both the widow ladies who joined in executing the bond were dead; so also was Reoti Prasad. The suit was brought against Suraj Prasad, minor son of Reoti Prasad, and his mother Musammat Kamla Devi, the widow of Reoti Prasad, was formally impleaded as an additional defendant in case any question might arise as to her rights. In reply to the suit the defendant put the plaintiffs to proof of execution, but this has been fully established and is no longer in question in appeal. The point for determination in appeal is whether the debt represented by this bond was incurred by Reoti Prasad alone or by Reoti Prasad and the two widows jointly, and whether as a matter of law the money paid as consideration for this bond was taken by Reoti Prasad in whole or in part for family necessity, so as to make the transaction binding upon the minor appellant. The court below having decided all the questions raised in favour of the plaintiffs, it is the minor Suraj Prasad who appeals to this Court. The first question we have to consider is whether the whole of the consideration was received by Reoti Prasad. According to the bond itself a sum of Rs. 3,900 was left with Budh Sen for payment to a creditor named Hardeo Das. The balance of Rs. 4,100 was paid over in cash at registration. It is in evidence that it was formally paid to the two ladies. There is also a great deal of evidence to show that at about this time Reoti Prasad was making a number of payments urgently necessary on account of Government revenue and to meet other debts. We have already pointed out that the whole of the property affected by the mortgage was Reoti Prasad's. On this state of facts, we think the court below was abundantly justified in finding that the whole of the consideration, including the sum of Rs. 4,100 paid in cash, reached the hands of Reoti Prasad

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and that the payment of this cash to the two widow ladies at the time of registration was as much a matter of form and precaution as the entry of the ladies' names in the village papers and their appearance as joint executants of the bond in suit. There remains the question of legal necessity for the alienation. Of the debt due to Hardeo Das, a sum of Rs. 3,100 was due upon a previous mortgage executed in his favour by Reoti Prasad alone on the 12th of June, 1901. The remainder was due on a promissory note. There is oral evidence, which has been accepted by the court below and which we see no reason to distrust, to prove that Hardeo Das received payment both on his mortgage and in respect of the unsecured debt. This evidence being accepted, the unsecured debt due to Hardeo Das stands beyond question as an antecedent debt for the payment of which Reoti Prasad was entitled to hypothecate the joint family property in his hands. The question of the sum of Rs. 3,100 paid in satisfaction of the mortgage of the 12th of June, 1901, has been strenuously argued before us. We have been referred to the decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), and more particularly to the manner in which that pronouncement has been interpreted in subsequent decisions of this Court, down to the case of *Ram Sarup* v. *Bharat Singh* (2). I do not feel it incumbent upon me in the present case to discuss or criticize the decision of another Bench of this Court above referred to. I take the liberty of saying only this much that, with all respect to the learned Judges concerned, I entertain some suspicion that the principles laid down by their Lordships of the Privy Council have received a considerable extension at the hands of this Court in the case above referred to. I do not see why stress should be thrown entirely upon the propositions of law laid down by their Lordships in *Sahu Ram Chandra* v. *Bhup Singh* (1) at page 447 of the report, to the entire ignoring of the question discussed in two previous pages, 443 and 444, regarding the pious duty thrown upon the sons and grandsons to discharge their father's debts. Their Lordships expressly noted that in the case before them the argument founded upon this pious obligation, as such, failed by reason of the fact that they were dealing

(1) (1917) I. L. R., 39 All., 437. (2) (1921) I. L. R., 43 All., 703.

with a case in which the father was still alive when the suit was brought by which it was sought to bind the rights of the sons in the joint family property. In a case like the present, in which the son is being sued after the death of the father, it seems clearly necessary that this question should be taken up and considered and decided first it is to be decided against the creditor on some other ground than that upon which it was disposed of in the case of *Sheo Ram Chandra v. Bhup Singh* (1). At the same time I am satisfied that the case now before us is clearly distinguishable from that of *Ram Saran v. Bharat Singh* (2), so that what I have said above regarding that decision may be taken as a personal expression of opinion not affecting the result of the present appeal. According to the plaint Suraj Prasad's age in the month of June, 1918, when this suit was instituted, was about 16 years. If so, he was born in or about the month of June, 1902. A more reliable piece of evidence as to his age is to be found in the guardianship certificate reproduced at page 15 of our printed book. According to this certificate Suraj Prasad was to attain the age of majority under the Guardians and Wards Act (VIII of 1890), that is to say, he was to complete 21 years of age, on the 5th of February, 1925. Assuming this piece of evidence to be correct, he was born in February, 1904; in any case, he was not in existence when his father hypothecated the joint family property in favour of Hardeo Das on the 12th of June, 1901, in consideration for a loan of Rs. 2,000. If the suit were on the bond of Hardeo Das, the appellant, Suraj Prasad, would not be entitled to contest the necessity for the alienation in question. On this point it is sufficient to refer to the decision of this Court in *Chuttun Lal v. Kuthu* (3). In the year 1901, therefore, Hardeo Das was not dealing with Reoti Prasad as the manager of a joint Hindu family consisting of himself and a minor son, or as a trustee for the interests of that son. Reoti Prasad was at that time the sole owner of the property which he hypothecated to Hardeo Das along with his covenant to repay the loan. Under these circumstances it seems to me clear that the question of legal necessity for the loan advanced by Hardeo Das cannot be raised in the

(1) (1917) I. L. R., 39 All., 437. (2) (1921) I. L. R., 43 All., 702.
(3) (1910) I. L. R., 33 All., 283.

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present suit and must be assumed against the defendant appellant. Therefore the debt due under this bond of the 12th of June, 1901, was an antecedent debt for the repayment of which Reoti Prasad could lawfully charge the joint family property in his hands. This disposes of the sum of Rs. 3,900, which we hold was applied to the satisfaction of the debts due to Hardeo Das. As regards the sum of Rs. 4,100, the court below has arrived at a clear finding regarding the manner in which this money was actually applied. The decision of the court below as printed in our paper book is disfigured by one or two apparent misprints and omits to notice one item of Rs. 100 paid into the Treasury on account of irrigation dues on the 16th of June, 1906. Making the necessary correction, I find that the payments alleged to have been made out of this advance of Rs. 4,100 are the following :—Rs. 1,000 paid on the 22nd of August, 1906, being the last instalment due upon a bond in favour of one Phul Chand executed on the 16th of February, 1899. It is proved that Rs. 1,000 were in fact paid to discharge this liability, *vide* the receipt reproduced on page 11 R. of our printed book. There were a number of payments on account of Government dues (land revenue and irrigation dues) aggregating Rs. 2,082-2-0 and there were two payments of Rs. 400 to a creditor named Nathu Ram and Rs. 600 to a creditor named Thakur Das The whole sum of Rs. 4,100 is thus accounted for except a small item of about Rs. 18, which appears on the face of it less than one would have reasonably expected to see charged in connection with the expenses for the execution and registration of the bond in suit. With regard to these items the appellant challenges the findings of the court below on the question of fact. After giving our best consideration to the arguments urged upon us, we think it sufficient to say that we feel satisfied that the court below was right. The payments on account of the Government demand are proved by unimpeachable evidence, as also is the payment of Rs. 1,000 to Phul Chand. The two payments to Nathu Ram and Thakur Das are proved by such oral evidence as one might reasonably expect and accept in a case of this sort. With regard to the payment to Phul Chand, the same question of law is raised as has been already discussed in connection with the mortgage

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in favour of Hardeo Das. The reasons given for deciding in favour of the creditor apply even more strongly in respect of this sum of Rs. 1,000 due in respect of a debt contracted even earlier than that in favour of Hardeo Das. We hold, therefore, that the decision of the court below was correct in law and in fact and we dismiss this appeal with costs.

WALSH, J.:—I agree. I think the judgment of the Subordinate Judge is an excellent one in every respect except that it lays itself open to one small criticism. With regard to the 1901 transaction, I am quite satisfied on the evidence that there was legal necessity to support it, sufficient to bind any minor sons who were living at the time. Where nothing is shown adverse to the character or mode of livelihood of a Hindu father, I do not think the courts ought to be astute to find objections or highly artificial conclusions as to the absence of legal necessity in transactions which took place long ago and which are thus necessarily difficult to establish in all their details by clear verbal proof in a court of law. The history of this man's business dealings laid a sufficient ground, in my opinion, for establishing conclusively the existence of necessity for raising a loan in 1901, in the absence of some definite evidence that the loan was raised for purposes inconsistent with his trust as father and manager of the family. The learned Judge has used language which suggests that in his view the mere antecedency of this debt in 1901 was sufficient to support it. I do not think he meant that. I think if he had asked himself the question whether there was legal necessity, he would have answered it in the affirmative. And it is not correct to say that mere antecedency is sufficient to support a charge made by a father upon family property for a debt. The learned Judge also found that the proof of the cash which was required at the time of the loan for family purposes and of the cash which was actually expended, nearly amounted to the money borrowed. It appears from what my brother has pointed out that the actual proof amounted to even more than what the learned Judge himself thought, but, as far as I am concerned, I should not have held that failure on the part of the plaintiff to prove every pie raised and expended for family necessity constituted a

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sufficient ground in law for interfering with the transaction even *pro tanto*. In all such transactions there must necessarily be some margin for what one may call incidental expenses, and to my mind the task imposed on a creditor of proving in a transaction at least twelve years old, and in this case going back seventeen years, in a sum so considerable as Rs. 8,000, the intended and actual destination of each rupee, is, humanly speaking, an impossible one, and for courts of justice in India to impose that duty upon a plaintiff as a matter of principle and, so to speak, to punish the creditor to the extent of every pie which he does not prove up to the hilt, is to invite the creditor to commit and suborn perjury in the trial courts. The failure to prove a small margin in a large sum like Rs. 8,000 is amply covered by the old maxim *de minimis non curat lex*. I agree with the order proposed.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

1923

February, 15.

BALDEO PRASAD (PLAINTIFF) *v.* BINDESHRI PRASAD (DEFENDANT)*

Hindu law—Liability of son for father's debt—Debt contracted while the father was a ward under the Court of Wards—Son not liable.

A Hindu, whilst a ward of the Court of Wards, and being, under the law then in force, incompetent to enter into any contract which might involve him in pecuniary liability, executed two promissory notes. After the father's death his son executed a bond in favour of the creditor for the amount covered by the promissory notes.

Held on suit by the creditor that the son was not under a pious duty to pay the debts of the father contracted in the above circumstances and that the bond was not enforceable against him. *Rajmal Shah* v. *Court of Wards* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellant.

Mr. *B.E. O'Conor*, Mr. *R. Malcomson*, Munshi *Badri Narain* and Munshi *Sarkar Bahadur Johri*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—It appears that one Ganesh Prasad was under the Court of Wards for several years up to the time of his death in May, 1914. On the 7th of

* First Appeal No. 264 of 1919, from a decree of Jogindro Nath Chaudhri, Additional Subordinate Judge of Banda, dated the 31st of May, 1919

(1) (1916) 46 Indian Cases, 974.

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January, 1912, and 10th of April, 1912, he executed two promissory notes in favour of Chunbe Baldeo Prasad for consideration, carrying interest at the rate of Re. 1-6-0 per cent. per mensem. Ganesh Prasad died leaving a will by which he left his estate in charge of certain trustees. The will of Ganesh Prasad was contested by his son Bindeshri Prasad, who in the end was successful in having it set aside. The Court of Wards continued in possession of the estate till the 13th of December, 1914. On the 5th of October, 1914, there was a compromise between Bindeshri Prasad and the trustees appointed under the will of his father. On the 6th of October, 1914, Bindeshri Prasad executed a simple money bond in favour of Baldeo Prasad in lieu of the moneys due on the two promissory notes given by his father on the 7th of January, 1912, and 10th of April, 1912, to Baldeo Prasad. The amount due on the said two promissory notes on the 6th of October, 1914, was found to be Rs. 9,251-8-9. The bond carried interest at the rate of Re. 1 per cent. per mensem. On the 6th of September, 1918, the suit, out of which this appeal has arisen, was brought by Baldeo Prasad to recover the sum of Rs. 9,251-8-9 plus interest on foot of the bond, dated the 6th of October, 1914. The claim was resisted by Bindeshri Prasad on various grounds. He said that the bond in suit was obtained from him under undue influence and pressure, that it was without consideration and that he was not bound to pay it. The learned Subordinate Judge who tried the suit came to the conclusion that Bindeshri Prasad had failed to prove the allegation as to pressure and undue influence, and that the bond was for consideration. But he further held that the defendant was not bound to pay it as the bond was given in lieu of debts which were contracted by his father at a time when the estate was under the Court of Wards, and under the Court of Wards Act a ward could not enter into a valid contract. In appeal before us it is contended on behalf of the plaintiff appellant that the view taken by the court below is incorrect. It is conceded that the bond in suit was given in lieu of the debts contracted by Ganesh Prasad at a time when he was a ward of the Court of Wards; but it is said that it is the pious duty of a Hindu son to pay off the debts of his father, and that the bond in suit was given for consideration and the defendant is liable to pay it.

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In support of this a case is cited which is to be found at page 974 of Vol. 46, Indian Cases. We find ourselves unable to accede to the contention of the plaintiff appellant. Under section 34 of Act III of 1899, the Act which was applicable at the time the two promissory notes of the 7th of January, 1912, and the 10th of April, 1912, were given, Ganesh Prasad was incompetent to enter into any contract which might involve him in pecuniary liability. In other words, any contract by which he made himself pecuniarily liable was void. The bond in suit was given by his son in consideration of the two promissory notes mentioned above. We do not think that it was the pious duty of the son to pay off such loans as were contracted by his father during the time that the estate was under the Court of Wards. The case relied on by the learned counsel on behalf of the plaintiff appellant is quite different to that before us. In that case both the father and the son gave a bond after the release of the estate from the management of the Court of Wards, not merely for the sum that was borrowed during the management of the Court of Wards but for a further sum that was advanced after the release of the estate. The facts of the two cases are quite different. We, therefore, agree with the lower court that the bond in suit is not enforceable against the defendant. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

1922

February, 15.

DHARAM SINGH AND ANOTHER (PLAINTIFFS) *v.* HIRA AND OTHERS (DEFENDANTS).*

Hindu law—Succession—Jats—Custom amongst Jats who have migrated from the Punjab.

Held that amongst Jats who have migrated to the district of Meerut from the Punjab there exists a custom by which reversioners irrespective of degree succeed equally to the last male owner, each branch of the family taking its share *per stirpes*.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju* and Munshi *Panna Lal*, for the appellants.

* First Appeal No. 287 of 1919, from a decree of Kashi Prasad, First Additional Subordinate Judge of Meerut, dated the 18th of June, 1919.

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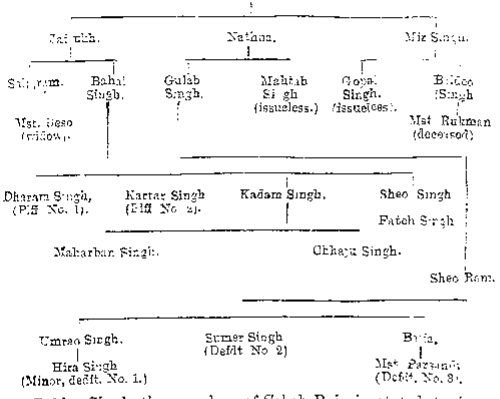
DHARAM SINGH v. HIRA.

Mr. *N. C. Vaish* and Dr. *Surendra Nath Sen*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—The following pedigree will show the right under which the parties to the suit are litigating:—



Baldeo Singh, the grandson of Sahab Rai, is stated to have died long ago, leaving him surviving his brother Gopal Singh and his widow Musammat Rukmon. She, after the death of her husband, lived with Gopal Singh as his wife by Karao marriage. The parties are Jats, and such a form of marriage is permissible in their community. Gopal Singh died about forty years ago. After the death of Gopal Singh, the name of Musammat Rukman was entered in the revenue papers in respect of the immovable property of the two brothers. She died on the 10th of July, 1915, without leaving any issue. After her death, there was a dispute in the Revenue Court between the descendants of Jaisukh and those of Nathua as to whose names should be entered in respect of the property which at one time belonged to Gopal Singh and Baldeo. The Revenue Court decided in favour of the descendants of Sheo Ram, and their names were accordingly

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mutated. Thereupon, on the 19th of September, 1917, the suit out of which this appeal has arisen was instituted by Dharam Singh and Kartar Singh, two of the grandsons of Jaisukh, for the recovery of the possession of the entire property of Gopal Singh and Baldeo Singh as the nearest reversioners. The claim was brought against the descendants of Sheo Ram who had been successful in the Revenue Court. The defendants resisted the suit on various pleas, two of which were that under an arrangement entered into between the descendants of Nathua and Jaisukh on the death of Baldeo Singh half of the property of the two brothers had been allotted to the descendants of Jaisukh and the other half was to go to the descendants of Nathua after the death of Gopal Singh and Musammat Rukman, and, secondly, that under a custom obtaining in the family to which the parties belonged, all the collaterals irrespective of their degree succeed equally to the last male holder. Both parties gave evidence. The court of first instance found that the family arrangement set up by the defence had not been proved. The custom advanced on behalf of the defence, however, was accepted by the court and a decree in favour of the plaintiffs to the extent of 1/4th in the property in suit was passed. The plaintiffs have come up in appeal before us and challenge the finding of the court below on the question of custom, while the defendants have filed cross-objections impeaching the finding of the lower court with regard to the alleged family arrangement stated in the written statement for the defence. It is contended on behalf of the plaintiffs appellants that the evidence on the record does not establish the custom upon which the defence relies for the proposition that all collaterals irrespective of degree succeed equally to the last male holder. The learned counsel for the appellants has read to us the evidence on behalf of the defence and has criticized it at length. We find that eleven witnesses were examined on behalf of the defence, all of whom with one voice say that the custom prevailing among the Jats who have migrated to Meerut from the Punjab, as to the succession of collaterals, is that reversioners irrespective of degree, that is, whether near or remote, inherit. They go on to explain in their evidence that when they say that reversioners succeed equally to the last male holder, they mean that each branch takes its

share *per stirpes* They also give instances, most of which are borne out by the khewats that have been tendered in evidence by the defence. One of the plaintiffs, Dharam Singh, himself had deposed in support of this custom in another case. In the present case he went into the witness-box and tried to explain his previous statement away but he failed. One of the witnesses for the plaintiffs, namely Paul Singh, also supports the case for the defence On the evidence as it stands on the record we find that the custom stated by the defence stands proved. The oral evidence for the plaintiffs is quite unsatisfactory and does not rebut the evidence for the defence. Moreover, we find that the custom deposed to by the defence witnesses is borne out by the customary law as enunciated in paragraph 25 of Mr. Rattigan's book "Digest of Customary Law for the Punjab." We are, therefore, of opinion that the finding of the lower court on this point is correct.

As to the cross-objections the arrangement set up on behalf of the defence is not borne out by any evidence worth the name.

The result is that both the appeal and the cross-objections fail, and we dismiss both of them with costs.

Appeal dismissed.

Before Mr. Justice Pigott and Mr. Justice Walsh.

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February 1

KRISHNANAND NATH KHARE (PLAINTIFF) v. RAJA RAM SINGH (DEFENDANT).*

Hindu law—Joint Hindu family—Pro note—Competence of managing member to execute a promissory note on behalf of the family—Act No. XXVI of 1881 (Negotiable Instruments Act), sections 4, 26, 27.

There is no inherent reason why the managing member of a joint Hindu family cannot in that capacity execute in his sole name a promissory note which shall be binding on the family as a whole and the property owned by it.

Krishna Aiyar v. Krishnasami Ayya (1), *Krishnashet bin Ganshet Sheiye v. Hari Valji Shetiye* (2), and *Basanji Chandra Do v. Ramdhan Dhor* (3) followed. *Sudasuk Jankidas v. Sir Kishan Pershad* (4) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

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* First Appeal No. 301 of 1919, from a decree of Maheshwari Prasad, Subordinate Judge of Gorakhpur, dated the 5th of June, 1914.

(1) (1900) I. L. R., 13 Mad., 397.
(2) (1895) I. L. R., 20 Bom., 428.
(3) (1906) 11 C. W. N., 189.
(4) (1918) I. L. R., 46 Calc., 668

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Munshi *Narayan Prasad Asthana* and Munshi *Durga Charan Singh*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondent.

PIGGOTT and WALSH, JJ.:—This is a suit brought upon a promissory note of 1917 which is admittedly a renewal of a previous promissory note of 1914 which in itself was a renewal of a previous promissory note of 1911. The promissory note in suit was made by one defendant only, namely Babu Ram Baran Singh. The suit is brought against Babu Ram Baran Singh and also his brother Babu Raja Ram Singh upon the ground that the note was made by the defendant Babu Ram Baran Singh as head and manager of a joint Hindu family of which his co-defendant Babu Raja Ram Singh was an adult member. The Kayastha Trading and Banking Corporation, Limited, were also made defendants as the original payees and endorsers in favour of the plaintiff. It appears that both the brothers, Babu Ram Baran Singh and Babu Raja Ram Singh, were makers of the original promissory note of 1911 of which the promissory note of 1914 was the first renewal. This fact may be of importance upon the question whether the note sued upon was in fact made for and on behalf of the joint family, of which the defendant Babu Ram Baran Singh was manager, for family purposes so as to bind the members of the family. The suit has been dismissed by the Subordinate Judge on the ground that there is no cause of action against the defendant Babu Raja Ram Singh for the reason that his name does not appear as a party to the promissory note in suit or as one of the makers thereof or, in other words, to quote the language of Lord BUCKMASTER in the report of the case decided by their Lordships of the Privy Council relied upon by the court below, upon the ground that the name of Babu Raja Ram Singh was not disclosed. In arriving at that conclusion, the court below has relied entirely upon the judgment of their Lordships in the case of *Sadasuk Janki Das* v. *Sir Kishun Pershad* (1), and particularly upon the principle there laid down as follows:—"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be

(1) (1918) I. L. R., 46 Calc., 668.

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instantly recognized as the document passes from hand to hand." In our opinion this principle has no application to the case of a joint Hindu family which it is sought to make liable through the signature of the managing member thereof. The position of the head of the joint Hindu family is not the same as that of an ordinary business agent and, according to the true view, a joint Hindu family, being a legal person according to Hindu law lawfully represented by and acting through the managing member or head thereof, is included ordinarily in the term "a person." In other words, a promissory note, according to the definition contained in section 4 of the Negotiable Instruments Act, is an instrument in writing containing an unconditional undertaking to pay a certain sum of money signed by the maker, and the question, in the event of the person in whose favour such document is given or into whose hands it may fall, in a case of an alleged joint Hindu family, is whether such a joint Hindu family is in fact the maker or only the member thereof who happens to have signed the document. Accepting the principles laid down in the authority referred to, we are of opinion that they have no application to the case before us. We are content to adopt without repeating at length the judgment of Mr. Justice SHEPHARD in the case of *Krishna Ayyar* v. *Krishnasami Ayyar* (1) on pages 604 to 606. The principle accepted by the majority of the Madras High Court in that decision has been inferentially accepted by the Bombay High Court in the case of *Krishnashet bin Ganshet Shetye* v. *Hari Valjibhatye* (2) and also by the Calcutta High Court in the case of *Baisnab Chandra De* v. *Ramdhon Dhor* (3) and we are content to follow the view taken in these three decisions.

It is extremely difficult to see how any other view could be made to work consistently with the ordinary methods of business and with the established principles of law. If the view taken by the lower court was sound, it would be necessary to require every person who was supposed to be a member of a joint Hindu family from whom it was desired to take a promissory note, to sign a document, including, presumably, even infant children in some way through their guardians. This would make it almost

(1) (1906) I. L. R., 28 Mad., 597. (2) (1895) I. L. R., 20 Bom., 463
(3) (1906, 11 C. W. N., 189

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1922
February, 17

MRS. L. F. MARTEN (DEFENDANT) v. HARDE RAM (PLAINTIFF) AND T. MARTEN (DEFENDANT).*

Will—Construction of document—Gift on death of children to any of the estate which the testatrix apparently intended to bequeath.

The will, executed in 1901, of a Mrs. M. J. Marten, purported to give to her two sons Harry Kenneth and Frederick William certain estates and effects in equal shares for their own use and benefit absolutely and for ever, and then proceeded —

"I further direct that on the death of either of my sons above-named his share of the property hereby bequeathed shall go in the first instance to his children and grandchildren, etc., in the direct line, if there be any at the time, but not to the widow or any other person, but, failing his children and grandchildren as aforesaid, the property hereby bequeathed shall revert immediately to the children and grandchildren, etc., in the direct line, of the surviving son, and, failing the children and grandchildren, etc., of the surviving son, to the surviving son himself, and then ultimately failing him it shall revert to the widow or widows of both of the deceased sons."

"I further direct that if the said Harry Kenneth Marten and Frederick William Marten cannot live jointly and enjoy the estates hereby bequeathed to them jointly they will divide the property bequeathed into two equal shares and will enjoy their respective shares absolutely and as their own for their lives and after that the property shall revert to their heirs in the manner and order indicated hereinbefore."

Both the sons died—Harry Kenneth in 1915 and Frederick William in 1917—without issue.

Held that, whatever may have been the intention of the testatrix, Frederick William took an absolute estate in the share which came to him on the death of his brother. *Byng* v. *Lord Strafford* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Munshi *Bhagwati Shankar*, for the appellant

Babu *Sital Prasad Ghosh*, for the respondents

MEARS, C. J., and BANERJI, J.:—The decision in this appeal turns entirely upon the view which we take of the proper construction of the will of a Mrs. Margaret Jane Marten

* First Appeal No. 239 of 1919, from a decree of Nitya Nand Pande, Subordinate Judge of Dehra Dun, dated the 9th of April, 1919.

(1) (1843) 5 Beavan, 558.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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February, 17.

MRS. L. F. MARTEN (DEFENDANT) v. HARDE RAM (PLAINTIFF) AND T. MARTEN (DEFENDANT).*

Will—Construction of document—Omission of words limiting the estate which the testatrix apparently intended to bequeathe.

The will, executed in 1901, of a Mrs. M. J. Marten, purported to give to her two sons Harry Kenneth and Frederick William all her estates and effects in equal shares for their own use and benefit absolutely and for ever, and then proceeded:—

"I further direct that on the death of either of my sons above-named his share of the property herein bequeathed shall go in the first instance to his children and grandchildren, etc., in the direct line, if there be any at the time, but not to the widow or any other person, but, failing his children and grandchildren as aforesaid, the property herein bequeathed shall revert immediately to the children and grandchildren, etc., in the direct line, of the surviving son, and, failing the children and grandchildren, etc., of the surviving son, to the surviving son himself, and then ultimately failing him it shall revert to the widow or widows of both of the deceased sons."

"I further direct that if the said Harry Kenneth Marten and Frederick William Marten cannot live jointly and enjoy the estates herein bequeathed to them jointly, they will divide the property bequeathed into two equal shares and will enjoy their respective shares absolutely and as full owners for their lives and after that the property shall revert to their heirs in the manner and order indicated hereinbefore."

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* First Appeal No. 239 of 1919, from a decree of Nitya Nand Pande, Subordinate Judge of Dehra Dun, dated the 9th of April, 1919.

(1) (1843) 5 Beavan, 535.

on the 23rd of December 1915, the property bequeathed to him passed to his brother Frederick William.

That latter gentleman had in his life-time, namely, on the 8th of July, 1916, and the 23rd of June, 1917, mortgaged part of the property which came to him under the will. After his death the plaintiffs sued defendant No. 1 as administratrix and as being in possession of the property and defendant No. 2 as his heir.

If Frederick William obtained on his brother's death an absolute right to his brother's one-half share, then the plaintiffs would succeed in the action If he got a life-interest only, then the property would be freed from the mortgage on the determination of his life-estate. The learned Subordinate Judge decided that the interest acquired was an absolute one. The appellants have laid emphasis on the fact that the husband and wife were not on good terms and that the whole structure of the will shows that it was the intention of the testatrix to carve out a series of life-estates so that under no assumable possibility could her husband come into any share of her property. On the other hand, Mr. *Sital Prasad Ghose* contended that the death of Harry Kenneth brought about a complete determination of any life-estate and that the next donee took absolutely For this proposition he relied upon the use of the word "failing" and that passage in the will which says that "the property herein bequeathed" shall revert &c., and the case of *Byng* v. *Lord Strafford* (1) He argued that "failing" meant a skipping over of several successive classes if in pursuing the order of succession ordained by the will any should be found not to be in existence or to have ceased to exist. Thus in the actual circumstances the children of both Harry Kenneth and Frederick William were necessarily passed over as non-existent, the "property bequeathed", *i. e.* the absolute interest in the one-half share, came to Frederick William and the widow of Harry Kenneth only came in if there had been at the death of Harry Kenneth no one of the persons in existence who by the terms of the will took precedence of her.

Whilst we are aware that the construction of any particular document is rarely aided by referring to a judicial construction

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Whilst we are aware that the construction of any particular document is rarely aided by referring to a judicial construction

(1) (1843) 5 Beavan, 558.

There is a clear analogy between the case now under our consideration and that of *Byng* v. *Lord Strafford* (1).

Mrs. Marten the testatrix created in clear words two life-estates in equal shares of the property bequeathed. After their determination she chose first the children or grandchildren of the deceased son, secondly the children or grandchildren of the surviving son, then the surviving son and, finally, the widows of both the sons. She, therefore, as in *Byng* v. *Lord Strafford*, (1) had in view a succession of legatees or interests after the first in the series.

In both cases the gift to the oldest son of George Byng and to Frederick William Marten was not limited as was the original bequest by the words "for life" or any equivalent words.

We are, therefore, of opinion that although the testatrix may have intended to create a succession of life-estates, she has nevertheless failed to use words imposing any restriction and, therefore, the ordinary rule in such cases must be implied and the share of the estate which came to Frederick William on the death of his brother, must be declared to be an absolute one.

We, therefore, affirm the decision of the lower court and dismiss the appeal with costs. From the costs incurred by the respondent in printing the paper book two-thirds should be disallowed on the ground that evidence irrelevant to this appeal was included.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

EMPEROR *v.* C DUNN*

1923

February, 17.

Criminal Procedure Code, section 423—Revision—Powers of High Court—Power to order expunction of remarks from judgments of lower courts when such judgments are not directly before the High Court by way of appeal or revision.

The High Court has no power to expunge from the judgments of lower courts remarks reflecting unfavourably upon the credibility or the character of witnesses, in cases in which the effective orders of the courts are not before the High Court either in appeal or on revision *Mohi Singh* v. *Mangal Khandu* (2)

* Criminal Reference, No 743 of 1921.

(1) (1843) 5 Beavan, 558. (2) (1911) I L. R., 33 Calc., 157.

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MARTEN v. HIRDE RAM.

There is a clear analogy between the case now under our consideration and that of *Byng* v. *Lord Strafford* (1).

Mrs. Marten the testatrix created in clear words two life-estates in equal shares of the property bequeathed. After their determination she chose first the children or grandchildren of the deceased son; secondly the children or grandchildren of the surviving son, then the surviving son and, finally, the widows of both the sons. She, therefore, as in *Byng* v. *Lord Strafford*, (1) had in view a succession of legatees or interests after the first in the series.

In both cases the gift to the eldest son of George Byng and to Frederick William Marten was not limited as was the original bequest by the words "for life" or any equivalent words.

We are, therefore, of opinion that although the testatrix may have intended to create a succession of life-estates, she has nevertheless failed to use words imposing any restriction and, therefore, the ordinary rule in such cases must be implied and the share of the estate which came to Frederick William on the death of his brother, must be declared to be an absolute one.

We, therefore, affirm the decision of the lower court and dismiss the appeal with costs. From the costs incurred by the respondent in printing the paper book two-thirds should be disallowed on the ground that evidence irrelevant to this appeal was included.

Appeal dismissed.

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* Criminal Reference, No 743 of 1921.

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evidence. We are informed that the District Magistrate did not agree with the magistrate who tried the case upon these points and that he desired to appeal against the acquittal. The authorities, however, refused to appeal.

These applications have been made with the intention of removing the remarks from the record to which the applicants object.

We have first to consider whether we have any authority to give the applicants the relief which they desire. Our procedure in criminal cases is to be found, except in regard to cases brought before the High Court in the exercise of its ordinary original criminal jurisdiction, in the Code of Criminal Procedure (Act V of 1898). This is clear from section 29 of the Letters Patent of this Court. We have, therefore, to examine the Criminal Procedure Code in order to discover whether it gives any authority.

It has been brought to our notice that other High Courts and Chief Courts and Judicial Commissioners' Courts have ordered portions of a record to be expunged, and it is argued that the fact that they did so affords authority for us to do so.

We are referred, first, to the case of *Baroda Nath Bhattacharyya* v. *Karait Sheikh* (1). There the Registrar of the Court was directed to expunge from a judgment of the Sessions Judge remarks which reflected on the Local Government, the District Magistrate and the Deputy Magistrate.

In 1911 TWOMEY, J., of the Lower Burma Chief Court, in the case of *Ma Kaya* v. *Kin Lat Gyi* (2) held that he had the power to order passages to be expunged from a judgment, but refused to use it.

In another case of the same Chief Court, *Emperor* v. *Thomas Pellako* (3), the presiding Judge directed passages to be expunged from a judgment.

In *Lachchu* v. *Emperor* (4) the Judicial Commissioner of Oudh directed a passage, which reflected upon the conduct of a counsel, to be expunged from the judgment.

It will be seen that in none of these decisions did the Court direct itself to the question as to whether it had any authority to pass such an order or whence it derived that authority. The

(1) (1898) 2 C. W. N., p. cclvi (Journal).
(2) (1911) 11 Indian Cases, 1000.
(3) (1911) 14 Indian Cases, 643.
(4) (1914) 24 Indian Cases, 156

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considered that the only consequential or incidental orders within the purview of the provision were orders which follow as a matter of course, being the necessary complements to the main order passed, without which the latter would be incomplete or ineffective (such as directions as to the refund of fines realized from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under section 250) for which no separate authority is needed, and orders which, though ancillary in character, require more than the support of a criminal court's inherent jurisdiction and could not be passed without express authority. We agree generally with the view taken in the Calcutta decision, and, on that view, the order which we are asked to pass is not a consequential or incidental order. It cannot be said on this interpretation that the expunging of remarks from the record which reflect on certain witnesses is a consequential or incidental order. Such expunction would, in no sense, be consequent on or incident to the effective order of the court below, which in these cases is contained in the finding of acquittal. It remains to be considered whether, if we do what we are asked to do, we can bring our action within the scope of our authority by regarding such an alteration as an amendment which may be just or proper. It has been argued strenuously before us,—we have had the advantage of hearing the arguments of two of the most experienced counsel at the Bar,—that the word 'amendment' as used in this sub-section confers a very wide power upon the Court and that we can without scruple consider the provision, which allows us to make any amendment that may be just or proper, authority for expunging the remarks to which exception is taken. We are unable to accept that view. We can read the word 'amendment' only to mean in this connection amendment of an effective order of the court below. Here the effective order is the order of acquittal. It is impossible for us to amend that on these applications. We are debarred from interfering in any way with the effective order, for the reason that we are not asked to question the acquittals. Thus there is nothing which we can amend in the effective orders. In support of the view which we take to the effect that the word 'amendment' means amendment of an effective order, we refer to a decision of a Bench of this

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cases in which we have no authority to interfere with the effective orders passed by the courts. We are unable to find that this Court has any authority in such circumstances. This view was taken by one of us in Criminal Reference *Chattura* v. *Basdeo Sahai and others*, decided on the 4th of October 1920. If it be held that the grievances of persons who are unjustly criticized by courts of law in circumstances which obviate the effective orders of the courts coming before superior courts in appeal or revision, are so great as to require a special enactment for their protection, the matter is one for the consideration of the Legislature, but as the law stands, we are satisfied that we have no authority. We, therefore, dismiss these applications.

Applications dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

JIWA RAM (PLAINTIFF) *v.* NAND RAM (DEFENDANT) *

1922 *February*, 21.

Civil Procedure Code (1908), *sections* 141 *and* 144—*Proceedings for restitution of benefits derived from a decree reversed on appeal—Application dismissed for default but subsequently restored—Execution of decree.*

Held that, proceedings under section 144 of the Code of Civil Procedure not being proceedings in execution, the provisions of section 141 of the Code apply to them.

Somasundaram Pillai v *Chokkalingam Pillai* (1) dissented from.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Panna Lal*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ. :—This is an appeal against an order of the Subordinate Judge of Aligarh, passed in certain proceedings taken under section 144 of the Code of Civil Procedure for the purpose of obtaining restitution.

The facts are as follows:—One Gobardhan Das died in the month of August, 1900, leaving two widows, Musammat Rupo and Musammat Singhari.

* First Appeal No 350 of 1919, from a decree of Ali Ansat, Subordinate Judge of Aligarh, dated the 14th of June, 1919.

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It was further declared that Musammat Rupo and Jiwa Ram were jointly liable for mesne profits from the 22nd of March, 1913, to the 20th of April, 1913.

The High Court directed an inquiry to be held in order that these liabilities might be ascertained In the order directing investigation nothing was said as to the court in which the inquiry was to be held. The case went down to the District court and was passed on to the court of the Subordinate Judge. The Subordinate Judge has now concluded the inquiry and given a decree in which he declares Jiwa Ram and Musammat Rupo jointly liable for a sum of Rs 708-3-2, while Musammat Rupo is declared to be solely liable for the sum of Rs. 1,691-3-0. It is to be mentioned here that Musammat Rupo died on the 28th of July, 1918, while the inquiry in the court of the Subordinate Judge was still pending.

Jiwa Ram now comes here in appeal and three points have been raised and argued on his behalf. The first point taken is that the order of the Subordinate Judge is *ultra vires*, inasmuch as he had no jurisdiction to make the inquiry and pass the decree now complained against. It is pointed out that when the order of remand was made by this Court, the case ought to have been taken up by the District Judge against whose decision the appeal had been filed here.

This point has not been pressed, and we may say that, in any case, we should not be disposed to entertain it. It is purely a technical plea, and in view of the circumstances of the case, and in particular, having regard to the long period during which this dispute between the parties has remained unsettled, we should be very reluctant to interfere on a ground like this. The learned Judge has conducted the inquiry very carefully and has discussed the merits of the case in full detail.

The next point taken is that the order of the Subordinate Judge is bad for the following reasons :—

It appears that after Nand Ram made an application for restitution under section 144 of the Code of Civil Procedure, he made a default in appearance. The result of this was that an order was passed dismissing his claim.

Subsequently Nand Ram made an application for restoration. A date was fixed for the hearing of this application and, on that

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On the language of section 583 it seems fairly clear that the proceedings for obtaining restitution were, under the old Code, proceedings in execution of decree.

The language of section 144, however, is very different, and we now find no mention regarding any application to be made for the purpose of executing the decree of the appellate court, nor do we find any direction laying down that such proceedings are to be regulated by the rules prescribed for the execution of decrees in suits.

The language of section 144 is very wide, and it is provided that for the purposes of making restitution, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on the variation or reversal which has been made in respect of the first court's decree It may well be doubted whether a court which was merely executing a decree could be deemed to be invested with such extensive powers, for it seems to us that under section 144 a court is enabled to pass orders and to make inquiries which might be altogether beyond the scope of the appellate court's decree. Be that as it may, however, we are satisfied that, in view of the difference of the language used in the present section 144 and the former section 583, we are justified in coming to the conclusion that proceedings under section 144 are not proceedings in execution of decree. In this view we hold that the terms of section 141 do apply to such proceedings, and that in the present case it was competent to the learned Subordinate Judge to set aside the order of dismissal for default and to restore the application.

The only other point which has been argued before us is with regard to the form of the lower court's decree We have

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JIWA RAM v. NAND RAM.

this possession was delivered both to Jiwa Ram and Musammat Rupo. It follows, therefore, that Jiwa Ram's possession continued from the 4th of May, 1910, till the 20th of April, 1913, when Nand Ram was restored to possession of that portion of the property which was found to be *waqf*.

Such being the state of things, we do not see why the liability of Jiwa Ram *qua* this sum of Rs. 1,691-3-0 should be limited in the manner suggested. He is the adopted son of Gobardhan Das and is the owner of the estate. He represents the estate in its entirety, and in this view of the facts we think that in the present proceedings Jiwa Ram should also be made liable for the sum of Rs. 1,691-3-0 without any limitation of his liability. In other words, Jiwa Ram's liability to pay this sum is not dependent upon any assets which he has taken from Musammat Rupo, if indeed he has taken any assets from her at all.

The result, therefore, is that the appellant's case fails. We dismiss the appeal with costs to respondents We direct, however, that the decree be amended so as to make it clear that the total sum awarded is payable by Jiwa Ram, appellant, to the respondent Nand Ram.

Appeal dismissed.

Before Mr. Justice Piggott and Mr. Justice Stuart.

MUBARAK FATIMA (PLAINTIFF) *v.* MUHAMMAD QULI KHAN (DEFENDANT) *

1922

February, 22.

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 201—*Evidence—Presumption—Suit for profits—Alteration in revenue records as to extent of plaintiff's share during the period covered by the suit.*

Where, in a suit for profits, it is found that there has been an alteration in the revenue record prior to the institution of the suit but made during the period for which profits are claimed, the duty of the court must be to consider the order by which the alteration was made and to give effect to the intention of the said order. If, for instance, a plaintiff was the recorded proprietor of an eight anna share in a mahal during the first year of the period in respect of

* Second Appeal No. 880 of 1920, from a decree of Kshirod Gopal Banerji, Additional Judge of Bareilly, dated the 10th of April, 1920, confirming a decree of Ibrahim Husain, Assistant Collector, First Class of Bareilly, dated the 17th of December, 1919.

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Appeal dismissed.

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court. The contention is that, even on the share of 12 biswansis and odd and the figures given in the patwari's statement and accepted by both the courts below, the sum in arithmetic has been so worked out as to give the plaintiff less than her lawful dues. We have not looked into this matter or allowed the point to be taken. It was essentially one of fact, to be determined by the lower appellate court and, not having been taken at all in that court, must be held to be concluded against the plaintiff by the decision of that court. With respect to the extent of the plaintiff's share, the memorandum of appeal raises two distinct points. The first of these is that the irrebuttable presumption recognized by this Court in the Full Bench decision of *Durga Prasad* v. *Hazari Singh* (1) should be applied to each one of the three years in suit in accordance with the entries in the revenue records as they stood at the commencement of each of those years. If this contention were adopted, the plaintiff would be entitled to profits calculated on the share as claimed in the plaint in respect of each of the years 1323 and 1324 Fasli, and to profits on the smaller share of 12 biswansis and odd in respect of the third year only. We have been referred to two decisions of this Court, one of which was in a suit for profits between the same parties. This is the case of *Mubarak Fatima* v. *Muhammad Quli Khan* (2). Reference is made in that judgment to a previous decision by another Bench of this Court in the case of *Lachman Prasad* v. *Shitabo Kunwar* (3). These two cases are authority for this proposition, that if on the date of the institution of a suit for profits the plaintiff's name stands in the revenue record as the proprietor of a certain share, the Revenue Courts are bound to presume the correctness of that entry and to frame their decree for profits accordingly, in spite of the fact that during the pendency of the litigation (either in the trial court, or in a subsequent appeal, or in second appeal) there may have been an order of the Revenue Court altering the entry in question. These cases are, therefore, distinguishable from the one now before us, in which there had been an alteration in the revenue record prior to the institution of the suit. We have to consider the question now raised independently of any express

(1) (1911) I. L. R., 33 All., 799. (2) (1921) I. L. R., 43 All. 697.

(3) (1920) I. L. R., 43 All., 177.

court. The contention is that, even on the share of 12 biswansis and odd and the figures given in the patwari's statement and accepted by both the courts below, the sum in arithmetic has been so worked out as to give the plaintiff less than her lawful dues. We have not looked into this matter or allowed the point to be taken. It was essentially one of fact, to be determined by the lower appellate court and, not having been taken at all in that court, must be held to be concluded against the plaintiff by the decision of that court. With respect to the extent of the plaintiff's share, the memorandum of appeal raises two distinct points. The first of these is that the irrebuttable presumption recognized by this Court in the Full Bench decision of *Durga Prasad* v. *Hazari Singh* (1) should be applied to each one of the three years in suit in accordance with the entries in the revenue records as they stood at the commencement of each of those years. If this contention were adopted, the plaintiff would be entitled to profits calculated on the share as claimed in the plaint in respect of each of the years 1323 and 1324 Fasli, and to profits on the smaller share of 12 biswansis and odd in respect of the third year only. We have been referred to two decisions of this Court, one of which was in a suit for profits between the same parties. This is the case of *Mubarak Fatima* v. *Muhammad Qui Khan* (2). Reference is made in that judgment to a previous decision by another Bench of this Court in the case of *Lachman Prasad* v. *Shitabo Kunwar* (3). These two cases are authority for this proposition, that if on the date of the institution of a suit for profits the plaintiff's name stands in the revenue record as the proprietor of a certain share, the Revenue Courts are bound to presume the correctness of that entry and to frame their decree for profits accordingly, in spite of the fact that during the pendency of the litigation (either in the trial court, or in a subsequent appeal, or in second appeal) there may have been an order of the Revenue Court altering the entry in question. These cases are, therefore, distinguishable from the one now before us, in which there had been an alteration in the revenue record prior to the institution of the suit. We have to consider the question now raised independently of any express

(1) (1911) I. L. R., 33 All., 799. (2) (1921) I. L. R., 43 All., 637.

(3) (1920) I. L. R., 42 All., 177.

and had ordered the plaintiff's name to be recorded in respect of a smaller share than that awarded to her in the Civil Court litigation. So far as we can understand the matter, the opinion of the learned Judges in the case above referred to was that the plaintiff had been found by the Civil Court to be entitled in her own right to one-sixth of a share of 7 biswas and odd, which is evidently just double the share in respect of which she was recorded as proprietor by the Revenue Court and in the papers on the basis of which the decree under appeal was framed. Assuming, as we must do, that this decision was correct, it would seem that the courts below have, as a matter of fact, awarded the plaintiff on account of each of the three years in suit only one-half of the profits which she would have obtained if the Revenue Court had not misunderstood the decree of the Civil Court upon which it professed to act. We think, however, that it is impossible for us in the present suit to give the plaintiff any relief on the basis of the contention. The presumption raised by the Revenue Court records must be applied either one way or the other. According to the plaintiff appellant it ought to be applied so as to treat her as proprietor of the entire share of seven biswas and odd during each of the years 1323 and 1324 Fasli, a contention which we have already repelled. If we had acceded to this contention, the plaintiff would have received a great deal too much. The only alternative for us, so far as the present suit is concerned, is to accept the revenue record as it stood on the date on which the present suit was instituted and to affirm the decree under appeal, although it proceeds upon an entry made in accordance with a Revenue Court decision which this Court has pronounced to be erroneous. The effect of the present suit will apparently be to dispossess the plaintiff to the extent of one-half of the share which the learned Judges of this Court in the former litigation pronounced to be her rightful share. We fear that we have to leave the plaintiff to seek an appropriate remedy for this dispossession in a further Civil Court litigation, unless she can persuade the Revenue Courts by means of a fresh application to re-consider their own order respecting the entry in the Revenue records in the light of the decision pronounced by this Court and to make a further correction. Even if this were done now, the actual result would be a temporary dispossession of the

and had ordered the plaintiff's name to be recorded in respect of a smaller share than that awarded to her in the Civil Court litigation. So far as we can understand the matter, the opinion of the learned Judges in the case above referred to was that the plaintiff had been found by the Civil Court to be entitled in her own right to one-sixth of a share of 7 biswas and odd, which is evidently just double the share in respect of which she was recorded as proprietor by the Revenue Court and in the papers on the basis of which the decree under appeal was framed. Assuming, as we must do, that this decision was correct, it would seem that the courts below have, as a matter of fact, awarded the plaintiff on account of each of the three years in suit only one-half of the profits which she would have obtained if the Revenue Court had not misunderstood the decree of the Civil Court upon which it professed to act. We think, however, that it is impossible for us in the present suit to give the plaintiff any relief on the basis of the contention. The presumption raised by the Revenue Court records must be applied either one way or the other. According to the plaintiff appellant it ought to be applied so as to treat her as proprietor of the entire share of seven biswas and odd during each of the years 1323 and 1324 Fasli, a contention which we have already repelled. If we had acceded to this contention, the plaintiff would have received a great deal too much. The only alternative for us, so far as the present suit is concerned, is to accept the revenue record as it stood on the date on which the present suit was instituted and to affirm the decree under appeal, although it proceeds upon an entry made in accordance with a Revenue Court decision which this Court has pronounced to be erroneous. The effect of the present suit will apparently be to dispossess the plaintiff to the extent of one-half of the share which the learned Judges of this Court in the former litigation pronounced to be her rightful share. We fear that we have to leave the plaintiff to seek an appropriate remedy for this dispossession in a further Civil Court litigation, unless she can persuade the Revenue Courts by means of a fresh application to re-consider their own order respecting the entry in the Revenue records in the light of the decision pronounced by this Court and to make a further correction. Even if this were done now, the actual result would be a temporary dispossession of the

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BUDHI LAL v. THE ADMINISTRATOR GENERAL OF MADRAS.

they were, were not affected by this decree. On the 20th of January, 1916, the mortgaged property was sold in execution of the decree aforesaid and was purchased by Budhi Lal, defendant No. 8, and one of the appellants before us, and on the 1st of June, 1917, he obtained possession of the property. The plaintiff has now brought this suit for sale on the second mortgage and he has impleaded as defendants the original mortgagor, the holder of the decree on the first mortgage, and the auction-purchaser in execution of that decree. The defence raised by the auction purchaser and the prior mortgagee decree-holder was that the plaintiff could not bring the property to sale without redeeming the prior mortgage. They also claimed Rs. 247 for improvements made on the property by the auction-purchaser.

The trial court decreed the plaintiff's claim subject to his paying Rs 793-8 and interest thereon at six per cent. per annum from the 23rd of January, 1916, to the date of payment, and Rs. 247 for improvements to the auction-purchaser before the plaintiff could sell the property, or, in other words, it gave a decree to the plaintiff conditional upon paying off the prior mortgage which had been, so to say, discharged by the auction-purchaser. The plaintiff went up in appeal and the learned Judge has, for reasons which commended themselves to him, decreed the plaintiff's claim unconditionally. The defendants, prior mortgagee and the auction-purchaser in execution of the decree under the prior mortgage, come here in second appeal, and their first contention is that the decree of the lower appellate court giving the plaintiff an unconditional decree for sale is bad and that the plaintiff should have been directed to redeem the first mortgage before he could bring the property to sale. They also claim the amount spent by the auction-purchaser on improvements as payable before the plaintiff could bring the property to sale.

As to the last contention, we have not been referred to any rule of law under which the auction-purchaser could make such a claim. It has been decided in the negative by the Madras High Court in the case of *Cangayam Venkataramana Iyer* v. *Gompertz* (1).

(1) (1908) I. L. R., 31 Mad., 425

they were, were not affected by this decree. On the 20th of January, 1916, the mortgaged property was sold in execution of the decree aforesaid and was purchased by Budhi Lal, defendant No. 3, and one of the appellants before us, and on the 1st of June, 1917, he obtained possession of the property. The plaintiff has now brought this suit for sale on the second mortgage and he has impleaded as defendants the original mortgagor, the holder of the decree on the first mortgage, and the auction-purchaser in execution of that decree. The defence raised by the auction purchaser and the prior mortgagee decree-holder was that the plaintiff could not bring the property to sale without redeeming the prior mortgage. They also claimed Rs. 247 for improvements made on the property by the auction-purchaser.

The trial court decreed the plaintiff's claim subject to his paying Rs. 798-8 and interest thereon at six per cent. per annum from the 23rd of January, 1916, to the date of payment, and Rs. 247 for improvements to the auction-purchaser before the plaintiff could sell the property, or, in other words, it gave a decree to the plaintiff conditional upon paying off the prior mortgage which had been, so to say, discharged by the auction-purchaser. The plaintiff went up in appeal and the learned Judge has, for reasons which commended themselves to him, decreed the plaintiff's claim unconditionally. The defendants, prior mortgagee and the auction-purchaser in execution of the decree under the prior mortgage, come here in second appeal, and their first contention is that the decree of the lower appellate court giving the plaintiff an unconditional decree for sale is bad and that the plaintiff should have been directed to redeem the first mortgage before he could bring the property to sale. They also claim the amount spent by the auction-purchaser on improvements as payable before the plaintiff could bring the property to sale.

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Before Mr. Justice Ryves and Mr Justice Gokul Prasad

ALI JAWAD AND OTHERS (PLAINTIFFS) *v* KULANJAN SINGH AND OTHERS (DEFENDANTS.)* 1922 *February*, 28.

Act No. I of 1872 (Indian Evidence Act), section 92, Proviso (3)—Evidence—Admissibility of parol evidence to qualify the terms of a document in writing.

Held on a construction of proviso (3) to section 92 of the Indian Evidence Act, 1872, that a distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event.

Ramjibun Serowgy v. *Oghore Nath Chatterjee* (1) and *Vithu Jawran* v *Ahavan* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Mukhtar Ahmad*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—The facts of this case are as follows. The plaintiffs executed on the 18th of September, 1903, a usufructuary mortgage for five years in favour of Kulanjan Singh and Sat Ram. The deed is not on the record and it is not clear what exactly was mortgaged. According to the plaintiffs, on the 10th of August, 1905, they executed a simple mortgage for Rs. 599 in favour of Mahabir Singh in which an eight anna zamindari share in five villages was hypothecated. The interest chargeable was Rs. 2 per mensem. On the 8th of October, 1908, the plaintiffs executed a usufructuary mortgage of an eight anna two pie share in three villages which had been hypothecated in the mortgage of 1905 in favour of Kulanjan Singh alone. This mortgage was for Rs. 2,400 and for 15 years. The plaintiffs stated that under a contemporaneous oral agreement, when the mortgage of the 10th of August, 1905, was entered into, it was agreed between the parties that if the plaintiffs executed a usufructuary mortgage subsequently, then in that case the mortgagee would not charge the interest as agreed

* Second Appeal No. 655 of 1919, from a decree of Abdul Hasan, Additional Subordinate Judge of Jaunpur, dated the 24th of April, 1918, confirming a decree of Farid-ud-din Ahmad Khan, Additional Munsif of Jaunpur, dated the 4th of January, 1917

(1) (1897) I. L. R., 25 Calc., 401. (2) (1917) 42 Indian Cases, 372.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad

ALI JAWAD AND OTHERS (PLAINTIFFS) *v.* KULANJAN SINGH AND OTHERS (DEFENDANTS.)* 1922 *February*, 28.

Act No. I of 1872 (Indian Evidence Act), section 92, Proviso (8).—Evidence—Admissibility of parol evidence to qualify the terms of a document in writing.

Held on a construction of proviso (8) to section 92 of the Indian Evidence Act, 1872, that a distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event.

Ramjibun Serowgy v. *Oghore Nath Chatterjee* (1) and *Vithu Jairam* v. *Akaram* (2) referred to.

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meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event." (*Vide* Woodroffe and Amir Ali, Law of Evidence, 6th Edition, page 601) This seems to sum up the English law on the question, and it does not seem to us that in this respect proviso (3) lays down anything different. In the case of *Ramjibun Serowgy* v. *Oghore Nath Chatterjee* (1) Mr. Justice SALE took the same view He says: "I do not think that it was intended by proviso (3) to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to the illustrations (*b*) and (*j*), I think the proper meaning of proviso (3) is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all and that it was to impose no obligation at all until the happening of a certain event, may be proved." The same view was taken by a learned Judge of the Nagpur Chief Court in *Vithu Jairam* v. *Akaram*, (2) and we agree entirely with that judgment. This disposes of the first point.

As to the second point, of course the plaintiffs could prove, if it was a fact, that when the mortgage of 1908 was executed, all liability under the previous mortgage of 1905 was discharged This, however, was not their case as brought in their plaint and the argument that the terms of the document itself are only consistent with this view cannot be supported. Under the mortgage of 1905, the principal sum of Rs. 599 was advanced. When the mortgage of 1908 was executed, it was recited that a sum of Rs. 600 was left with the mortgagee "to pay Mahabir." That is all. No reference is made to any particular debt or to any particular mortgage, much less is there any recital to the effect that this payment of Rs. 600 was in complete satisfaction of the whole debt due to Mahabir. But it is said that the words later on written in the document must be considered. They are to the effect that the property then mortgaged "is free from all charges and liability." It is said these words can only mean that the whole liability under the mortgage of the 10th of August, 1905, was admitted to have been discharged. There might have been some force in this argument if it were not a

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GULAB CHAND v. KAMAL SINGH.

Pandit *Shiam Krishna Dar*, for the appellant.

Munshi *Narain Prasad Ashthana*, for the respondents.

GOKUL PRASAD, J.:—This was a suit to recover a certain amount on the basis of a *hundi* executed by defendants Nos. 1 and 2, Debi Singh and Dan Sahai, on the 18th of June, 1914. The defendants pleaded that they executed the *hundi* but that it was without consideration and was obtained through undue pressure.

The trial court came to the conclusion that the defendants had failed to prove that the *hundi* was executed under undue influence or without consideration. It accordingly decreed the suit against defendants Nos. 1 and 2, the executants of the *hundi*.

The defendants went up in appeal. They abandoned the plea of undue influence but contended that the consideration alleged by the plaintiff was no consideration in law. The learned Judge gave effect to this contention of the defendants appellants and dismissed the suit.

The plaintiff comes here in second appeal and challenges the correctness of the finding of the lower appellate court.

The facts are shortly as follows. On the 5th of August, 1903, the defendants, Debi Singh and Dan Sahai, with their two brothers, borrowed a sum of Rs 21,000 carrying interest at six per cent. per annum from the plaintiff and made a usufructuary mortgage of certain property in his favour for 18 years. On the same date two of the mortgagors took a lease of the mortgaged property for 18 years, that is to say, for the period of the mortgage, at Rs. 1,900 per annum. The mortgage was to end after 18 years without any further payment being made by the mortgagors, the principal and interest being satisfied by the plaintiff's possession for 18 years as aforesaid. The lease is specifically mentioned in the mortgage and certain conditions about the increase and decrease in revenue were to take effect only in case the lessees were ejected for non-payment of rent. As I have stated above, the mortgage was to be satisfied simply by possession for 18 years, there was no account to be made and nothing to be paid by one party to the other under ordinary circumstances, or, to put it in other

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GULAB CHAND v. KAMAL SINGH

I come next to the facts. Was there here forbearance of a *bond fide* claim?" Then he went on to deal with the facts of that particular case.

There is no doubt that if the plaintiff's allegations in this case are correct, he was likely to lose Rs. 568 per annum for a large number of years and was at the same time bound to give up possession of the property after the lapse of the period of the mortgage, there being no express provision in the mortgage for the recovery of such deficiency.

Under these circumstances, in my opinion, the plaintiff believed that he had a *bond fide* claim to enforce and his forbearance from trying to put that claim in court and to have it decided was good consideration for the *hundi* in dispute. In my opinion the decision of the trial court was correct. I would, therefore, allow the appeal and set aside the decree of the lower appellate court. As Dan Sahai, one of the defendants respondents, has died and his heirs have not been brought on the record, the appeal as against him abates. I would, therefore, decree the claim against the defendant respondent Kamal Singh with costs in all courts. In other respects the decree of the first court is confirmed.

STUART, J.—I have little to add to the judgment of my learned brother. The first question that we had to decide was whether the *hundi* in question had been executed in consideration of Gulab Chand forbearing his right to sue the executants of the *hundi* for damages in respect of their acts, whereby he had been confined to the recovery from them of rent as ex-proprietary tenants, instead of being able to enforce against them the rent fixed by the lease. The point was not brought out very clearly in the courts below, but there can be no doubt as to the fact that the *hundi* was executed in consideration of Gulab Chand forbearing to sue. I am clear in my mind that the question which he had a right to litigate was neither vexatious nor frivolous. Whether he would or would not have succeeded had he instituted a suit on this cause of action, it is unnecessary for me to attempt to decide. I am not as confident as the learned District Judge was that he would have had no chance of success. Applying the test laid down by BOWEN,

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NARAIN SINGH v. RAJ KUMAR SINGH

REVES and GOKUL PRASAD, JJ. :—The following facts are admitted. Dawan and Budhan Singh were brothers. Dawan died leaving him surviving a widow Musammat Khaira and two daughters, Musammats Kalwanta and Maktola On his death, his widow's name was recorded against half the property that had originally belonged to Ranjit Singh, the father of the above mentioned brothers. Budhan had two wives, Musammats Palti and Samarkha, and by the latter a daughter Musammat Jagta, who was the mother of Raj Kumar Singh, plaintiff No. 1, and two other sons who are now dead, who were also plaintiffs.

The plaintiffs (who are all minors) brought this suit on the allegation that the two brothers Dawan and Budhan were joint, and that on the death of Dawan, Budhan succeeded to the whole property by right of survivorship, and that Musammat Khaira's (Dawan's widow's) name was recorded against half only for her consolation. After her death, and Budhan's death, the names of his widows were recorded against the entire family property. On their death, Musammat Jagta Kunwar succeeded to a daughter's estate and the name of the plaintiff was recorded against the whole property. Then Musammats Kalwanta and Maktola brought a suit against Musammat Jagta, claiming the property, and on the 20th of June, 1911, "deceived her and caused her to file a compromise" by which she admitted their right to half the property which is now the subject of dispute. The suit was decreed according to the compromise and their names were recorded against half On the 16th of September, 1912, these ladies executed a mortgage, which was "fictitious and without consideration," in the name of Narain Singh. The relief claimed in this suit was a declaration that on the death of Jagta the plaintiffs were owners of the property in dispute, and prayed that the mortgage be "cancelled" as against the plaintiffs.

They made Musammat Kalwanta (Maktola being dead) defendant first party, Musammat Jagta defendant second party, and Narain Singh and his sons, defendants third party.

The main defence to the suit was that Dawan Singh and Budhan were separate, and his widow's name was entered against her late husband's own share as his heir; that on her death, the widows of Budhan wrongfully got possession of this property;

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RYVES and GOKUL PRASAD, JJ. :—The following facts are admitted. Dawan and Budhan Singh were brothers. Dawan died leaving him surviving a widow Musammat Khaira and two daughters, Musammats Kalwanta and Maktola. On his death, his widow's name was recorded against half the property that had originally belonged to Ranjit Singh, the father of the above mentioned brothers. Budhan had two wives, Musammats Palti and Samarkha, and by the latter a daughter Musammat Jagta, who was the mother of Raj Kumar Singh, plaintiff No. 1, and two other sons who are now dead, who were also plaintiffs.

The plaintiffs (who are all minors) brought this suit on the allegation that the two brothers Dawan and Budhan were joint, and that on the death of Dawan, Budhan succeeded to the whole property by right of survivorship, and that Musammat Khaira's (Dawan's widow's) name was recorded against half only for her consolation. After her death, and Budhan's death, the names of his widows were recorded against the entire family property. On their death, Musammat Jagta Kunwar succeeded to a daughter's estate and the name of the plaintiff was recorded against the whole property. Then Musammats Kalwanta and Maktola brought a suit against Musammat Jagta, claiming the property, and on the 20th of June, 1911, "deceived her and caused her to file a compromise" by which she admitted their right to half the property which is now the subject of dispute. The suit was decreed according to the compromise and their names were recorded against half. On the 16th of September, 1912, these ladies executed a mortgage, which was "fictitious and without consideration," in the name of Narain Singh. The relief claimed in this suit was a declaration that on the death of Jagta the plaintiffs were owners of the property in dispute, and prayed that the mortgage be "cancelled" as against the plaintiffs.

They made Musammat Kalwanta (Maktola being dead) defendant first party, Musammat Jagta defendant second party, and Narain Singh and his sons, defendants third party.

The main defence to the suit was that Dawan Singh and Budhan were separate, and his widow's name was entered against her late husband's own share as his heir; that on her death, the widows of Budhan wrongfully got possession of this property;

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NARAIN SINGH v. RAJ KUMAR SINGH.

An elaborate argument has been addressed to us on both sides and a large number of cases have been quoted, some of which may not be easily reconciliable, but having regard to the findings of the lower appellate court, we have no difficulty in deciding the appeal, and do not propose to discuss these rulings.

The main argument for the appellants is (1) the compromise was *bonâ fide*, and until it could be proved that it had been obtained by fraud, it could not be set aside. Fraud had not been proved. (2) The compromise may be regarded "as a family settlement" within the meaning of the well known Privy Council cases, and, as such, was binding. It is said there was a *bonâ fide* dispute between the members of the family. Jagta represented the estate and this was a reasonable settlement by her by which each branch of the family got a half.

Now, what are the facts? The brothers were joint. On the death of Dawan, Budhan succeeded to the whole of the property. On his death his widows were entitled to a life estate, after them the daughter of Budhan came into a life estate and on the birth of Raj Kumar Singh, plaintiff No 1, he was sole reversioner to the whole. This state of things depended on whether Dawan and Budhan were separate or joint. It was admitted in the lower appellate court that they were joint when Dawan died. It follows that his daughters Maktola and Kalwanta had no shadow of claim to any of the property when they filed their suit against Jagta and the infant Raj Kumar Singh Soon after the filing of the plaint in that suit, the 27th of June, 1911, was fixed for the appointment of Jagta as guardian *ad litem* to her infant son, then a baby in arms. On the 20th of June, Jagta filed her compromise. No written statement had been put in, issues had not been fixed, nor was any order made appointing a guardian *ad litem* for the minor. These facts speak for themselves. There was no contest, and the conduct of Jagta, who was in possession of the whole property and who should have known that the plaintiffs had no sort of claim, was so precipitate, (although the courts below have held it to be "reckless" only), that the inference that the compromise was obtained improperly is almost irresistible. But, in any case, as held by the Privy Council in the case relied on by the lower court, Jagta could

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SARDAR MAL, HARDAT RAI v. SHEO BAKHSH RAI SRI NARAIN

arbitration of Lala Sheo Narain and Lala Gauri Shankar. The award was made as late as 23rd of August, 1919. Two of the parties, Sri Ram Mahadeo Prasad and Sheo Bakhsh Sri Narain, have raised various objections to the validity of the award, but only one such objection is pressed by their learned pleader and runs as follows :—

'Because the arbitrators proceeded with the arbitration in the absence of the objectors and did not give full opportunity to the objectors to defend themselves in the proceedings.'

"A fresh objection was taken at the time of the arguments on the ground that the provisions of the first schedule, clause (3) have not been complied with and that the arbitrators have not made their award in writing within three months after entering on the reference, nor have they made their award within three months after having been called on to act by notice in writing by one of the parties to the submission."

[Here the District Judge discussed and disposed of the first objection.]

"Coming to the second point, an arbitrator 'enters on the reference' when he hears the case. According to the evidence of Lala Sheo Narain the case was actually heard on the 12th of July, 1919. The award was made within three months of that date. It is proved from the record that on the 22nd of April, 1919, a notice was sent in writing to the arbitrators by Sri Ram Mahadeo Prasad calling on them to act on the submission. There is certainly a condition attached to the notice asking the arbitrators to make an award within seven days, otherwise not to proceed with the arbitration at all. The condition, so far as it is illegal, is clearly void, but I think the arbitrators were bound to make the award within three months of the date they were called on to act. As the award was actually made on the 23rd of August, 1919, the provisions of schedule I, clause (3), have not been complied with."

Mr. *B. E. O'Conor*, Mr. *G. W. Dillon*, Dr. *S. M. Sulaiman*, Dr. *Surendra Nath Sen* and Babu *Saila Nath Mukerji*, for the appellant.

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PRIVY COUNCIL.

RANI BIJAI RAJ KUNWAR (DEFENDANT) v. JAI INDAR BAHADUR SINGH (PLAINTIFF).

P. C.* 1922 April, 10

[On appeal from the Board of Revenue for the United Provinces of Agra and Oudh.]

and

JAI INDAR BAHADUR SINGH (DEFENDANT) v. RANI BIJAI RAJ KUNWAR (PLAINTIFF)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Will—Construction—Land in Oudh—"Sir Lands"—Lands given to wife for maintenance—Entire village—Assessment to rent—Oudh Rent Act (XXII of 1886), sections 7, 107G.

The proprietor of land in Oudh by his will devised his estate to his nephew, but provided that his widow should get from the estate an allowance in cash "besides the *sir* lands in his possession *(zirat maghuza)*." The testator had during his life handed over to his wife plots of *sir* land in certain villages; and in 1911 had petitioned stating that he had given an entire village to her as "*muafi*" revenue free, and praying for mutation of names, and an entry had been made in the register accordingly. At the first regular settlement the village had been entered in the register as "*sir*" land in possession of the then proprietor's wife for her maintenance, but owing to a change in the view of the revenue authorities as to what constituted "*sir*" land it had since been registered as "*muafi*." Upon the death of the testator in 1919, his nephew, who succeeded under the will, sued the widow to have the village assessed to rent under section 107G of Act XXII of 1886; section 7 of that Act places a restricted meaning on "*sir*."

Held that the words of the will covered not only land which could accurately be described as "*sir*", but also the village; that the widow was under the will proprietor for her life and the testator's nephew was not entitled to have rent assessed under Act XXII of 1886.

Parbati Kunwar v. *Deputy Commissioner of Kheri* (1) distinguished.

Judgment of the Board of Revenue reversed, judgment of the Court of the Judicial Commissioner affirmed.

Observations as to the inclusion of a large number of irrelevant documents in the record as sent from India.

CONSOLIDATED APPEAL (No. 130 of 1918) from (*a*) a judgment and decree of the Board of Revenue (18th and 16th December, 1916), reversing a decree of the Commissioner of the Lucknow division, and (*b*) two judgments and decrees of the Court of the Judicial Commissioner (31st January and 30th August, 1918), reversing a decree of the Subordinate Judge of Kheri.

* *Present*.—Viscount CAVE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE and Mr AMEER ALI.

PRIVY COUNCIL.

RANI BIJAI RAJ KUNWAR (DEFENDANT) *v.* JAI INDAR BAHADUR SINGH (PLAINTIFF).

P. C.* 1922 *April*, 10

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[On appeal from the Court of the Judicial Commissioner of Oudh.]

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Held that the words of the will covered not only land which could accurately be described as "*sir*", but also the village; that the widow was under the will proprietor for her life and the testator's nephew was not entitled to have rent assessed under Act XXII of 1886.

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* *Present*:—Viscount CAVE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE and Mr AMEER ALI.

(1) (1918) I. L. R., 41 All., 541. L. R., 45 I. A., 111.

not "*sir*". No proprietary interest was conferred on the widow by the will, there being no registered instrument as required by section 122 of the Transfer of Property Act, 1882. Upon a grant for maintenance by a taluqdar there is no transfer of the proprietary interest; under section 107A of Act XXII of 1886, the testator could have sued to have rent assessed, although the grant was rent free. [Reference was also made to section 10 of Regulation XIX of 1793; Oudh Land Revenue Act (XVII of 1876), sections 52, 54, 55.] Section 109 of the Indian Succession Act (X of 1865), which refers to obligations imposed upon a legatee by a will, does not apply. None of the cases cited in Jarman on Wills upon that principle relate to gifts to two different persons

Dunne, K. C., replied.

April, 10th.—The judgment of their Lordships was delivered by Sir JOHN EDGE:—

These are two consolidated appeals. In the earlier of these appeals Rani Bijai Raj Kunwar is the appellant, and Thakur Jai Indar-Bahadur Singh is the respondent. It is an appeal from a decree or order of the 16th of December, 1916, made by the Board of Revenue of the United Provinces of Agra and Oudh in appeal in a suit which was brought in the Court of the Deputy Commissioner of Kheri on the 19th of March, 1915, by the then manager under the Court of Wards of the property of Thakur Jai Indar Bahadur Singh, then a minor, against Rani Bijai Raj Kunwar, to have Rs 5,542-11-9 assessed as rent on mauza Chhauch under section 107G of Act No XXII of 1886. In the later of the two consolidated appeals Thakur Jai Indar Bahadur Singh is the appellant and Rani Bijai Raj Kunwar is the respondent. It is an appeal from two decrees, of the 31st of January and the 30th of August, 1918, made by the Court of the Judicial Commissioner of Oudh in appeal in a suit which was brought in the Court of the Subordinate Judge of Lakhimpur on the 27th of July, 1915, by Rani Bijai Raj Kunwar against Thakur Jai Indar Bahadur Singh for a declaration that she was entitled to hold mauza Chhauch for her life rent free, under her deceased husband's will, and that the mauza was not liable to be assessed to rent during her life time. It is to be

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Rajindra Bahadur Singh, as the owner of the estate of taluqa Mahewa, had powers to give, sell, mortgage or bequeath the taluqa or any part of it to whomever he pleased, but his widow, should he leave one, would be entitled to maintenance suitable to her condition as his widow. Rajindra Bahadur Singh in 1911 handed over to Rani Bijai Raj Kunwar, his wife, possession of mauza Chhauch, * and on the 1st of September, 1911, he presented a petition to the Revenue Authorities, which, so far as is material, was as follows :—" 1. The petitioner is the absolute owner of taluqa Mahewa, district Kheri, and the village of Chhauch bearing the 'hadbast' (boundary) No. 249 forms part of the taluqa aforesaid. The petitioner has all proprietary powers in respect of his taluqa. 2. The petitioner has given the entire village of Chhauch to his wife as 'muafi.' The revenue of this village would be paid from the income of the taluqa, and the village would always remain in the possession of his wife as revenue-free 'muafi' 3 This application is therefore presented, and it is prayed that entries regarding mutation of names in favour of the aforesaid wife may be made in the revenue department as herein prayed for and the village may be entered as 'muafi' under clause 6."

On that the Tahsildar reported, on the 10th of November, 1911, to the Deputy Collector, as follows

" SIR.—An application was made by Thakur Raj Indar Bahadur Singh, taluqdar of Mahewa, to the effect that he had given mauza Chhauch in pargana Kheri to his wife as muafi, that its revenue would be paid from the taluqa, and that it might be entered in the name of the Rani as muafi. An enquiry was made. A writing from the taluqdar corroborates the contents of the application. The taluqdar has given mauza Chhauch to his wife, the Rani, as muafi. As no document has been executed, mutation proceedings cannot be taken. Of course, as reported by the office, entries can be made in papers, under clause 6. In my opinion, there is no harm in making entries in this way. Under clause 8A, under the head of muafi, in the column of remarks these words should be written : 'The whole of this village has been given by the taluqdar to the Rani as "muafi" for her maintenance.'

Hence this report is submitted to sanction the entries aforesaid."

Thereupon the Assistant Collector made the following order :—

" Claim for mutation of names in respect of mauza Chhauch, pargana Kheri.

* [He had also handed over to her the cultivated plots in the eight villages : See page 446, A. M. T.]

Rajindra Bahadur Singh, as the owner of the estate of taluqa Mahewa, had powers to give, sell, mortgage or bequeath the taluqa or any part of it to whomever he pleased, but his widow, should he leave one, would be entitled to maintenance suitable to her condition as his widow. Rajindra Bahadur Singh in 1911 handed over to Rani Bijai Raj Kunwar, his wife, possession of mauza Chhauch, * and on the 1st of September, 1911, he presented a petition to the Revenue Authorities, which, so far as is material, was as follows :—" 1. The petitioner is the absolute owner of taluqa Mahewa, district Kheri, and the village of Chhauch bearing the 'hadbast' (boundary) No. 249 forms part of the taluqa aforesaid. The petitioner has all proprietary powers in respect of his taluqa. 2. The petitioner has given the entire village of Chhauch to his wife as 'muafi.' The revenue of this village would be paid from the income of the taluqa, and the village would always remain in the possession of his wife as revenue-free 'muafi' 3. This application is therefore presented, and it is prayed that entries regarding mutation of names in favour of the aforesaid wife may be made in the revenue department as herein prayed for and the village may be entered as 'muafi' under clause 6.''

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in cash, besides the '*sir*' lands in her possession, that my wife shall be the owner, and take possession of all my personal goods, such as clothes, ornaments, utensils used in eating and cooking, articles of decoration of the residential house, etc., that Rs. 250 per mensem shall be paid from the estate to my younger brother, Kunwar Sheo Indar Bahadur Singh, who is living with me up to this time, besides the '*sir*' lands possessed by him, and both these two allowances in cash shall be a charge on the estate, and the person in possession of the estate shall be liable for the same, that the person in possession of the 'taluqa' shall be responsible to pay Rs. 50,000 for the expenses of each of the daughters who may be unmarried at the time of my death, that if, God forbid, dear Jai Indar Bahadur Singh, aforesaid, die intestate without leaving a male child, then his nearest male heir descending from Mahendra Bahadur Singh, Narendra Bahadur Singh and Sheo Indar Bahadur Singh, will be entitled to succeed to the 'gaddi' and to be the owner of all the estate. . . ."

Thakur Jai Indar Bahadur Singh is the nephew described in the will as Jai Indar Bahadur Singh, and Rani Bijai Raj Kunwar is in the will referred to as Musammat Jai Raj Kunwar, the testator's wife.

Thakur Jai Indar Bahadur Singh did not succeed by right of inheritance to the Mahewa estate or to any part of it; his title depends on the will, and such interest in the Mahewa estate as he has depends on the will. He took under the will, and not otherwise. On behalf of Rani Bijai Raj Kunwar it is contended that under the will mauza Chhauch (Chak Khakra excepted) passed to her for her life free of rent, and that mauza Chhauch will not vest in Thakur Jai Indar Bahadur Singh until she has died, and that until that event shall have happened Thakur Jai Indar Bahadur Singh will not be the proprietor of mauza Chhauch within the meaning of Act XXII of 1886 as amended by Act IV of 1901, or entitled to sue to have any rent assessed upon that mauza. That contention depends upon the true construction of the will, which involves the meaning of words in the will which have been thus translated by the official translator "That Musammat Jai Raj Kunwar, my wife, shall get Rs. 500 per mensem from the estate in cash besides the '*sir*' lands in her possession." That is the official translator's rendering of the vernacular words in the will. In the judgment of the Board of Revenue of July, 1916, the words in question are translated thus: "To my wife for life five hundred rupees per mensem besides *sirat maqbuza* will be given from the estate." In their

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on the rent-free '*guzara*' of his aunt, the widow of the testator. The Deputy Commissioner has decreed the claim. It appears to me that the suit should never have been brought. The present taluqdar, as represented by the Court of Wards, is willing himself to be benefited by the terms of the will. But he wishes to deprive his benefactor's widow of the benefit which was meant to accrue to her under the same will. We must clearly take it that the defendant appellant is entitled under the terms of the grant or will to hold this village rent-free for her life."

The Commissioner of the Lucknow division dismissed the Revenue Court suit. From that decree dismissing the suit Thakur Jai Indar Bahadur Singh appealed to the Board of Revenue. The Board of Revenue in their judgment said:—

"It is urged by the respondent that under the Succession Act of 1865, she has devised (had devised to her) the land held by her as '*sir at maqbuza*', and the effect was to give her a proprietary title for life. It is further urged that, as the village in suit was held by her in the same way as she had held the other lands at the time of the will, the result of the will also was to confer on her a proprietary grant for life of this village. It may be admitted that the words '*sir at maqbuza*' in the will were certainly intended to cover the rent-free grants held by her at the time of the execution of the will. The appellant argues, however, that there is a great difference between a whole village and plots of land within a village, however numerous the latter might be, and that a whole village could not be termed '*sir*', however loosely the word is used, and that the fact that the previous taluqdar made a separate application in 1911 about the whole village clearly shows that he meant to differentiate it from the other land, and for this argument there is a good deal to be said."

In the result the Board of Revenue held that section 107(*i*) of Act XXII of 1886 as amended by Act IV of 1901 applied, and made a decree assessing mauza Chhauch to rent. From that decree Rani Bijai Raj Kunwar has appealed to His Majesty in Council.

The Subordinate Judge of Kheri, before whom the civil suit first came, framed six issues, the first of which was, "Is the suit not cognizable by the Civil Court?" He held that the questions whether the plaintiff (Rani Bijai Raj Kunwar) was "entitled to hold the village (mauza Chhauch) rent-free as a life interest bequeathed to her under her late husband's will and that she is not liable to assessment of rent during her life-time" were exclusively for the Court of Revenue, and by his decree dismissed the suit. Rani Bijai Raj Kunwar appealed from that

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value for the decision of that question. It has not been shown to their Lordships that the Judicial Commissioners formed an incorrect estimate of the value of that oral evidence. The learned Judicial Commissioners took in their Lordships' opinion, safer ground for the consideration of that question in the history of the manner in which mauza Cahauch had been dealt with since it had been settled with Gajrang Singh, and particularly by Rajindra Bahadur Singh. They also placed great reliance on the introduction to the late Mr Sykes' well-known and valuable Compendium of the Law relating to the Taluqdars of Oudh, and quoted the following passage which occurs in Mr. Sykes' observations on the various classes of *sir* in Oudh. Mr. Sykes, in discussing that subject, stated that:—"Amongst the various classes of *sir* of underproprietors who never had the full and exclusive proprietary right of the whole village is the land frequently assigned to the junior branches of a family for their support, instead of breaking up the estate and giving them the ancestral shares to which they were entitled. Such appanages are known in Oudh by the name of *sir*. They also form one and the chief class of *Jewan Birt*, which is a name also sometimes applied to this class of *sir*. Whole villages assigned in this way were also called Bhayai villages."

In support of that statement by Mr. Sykes, the Judicial Commissioner quoted a passage from Volume I of the Oudh Gazetteer of 1877, which was published under the authority of the Government, and a passage from the Fyzabad Settlement Report of 1880. The passage from the Oudh Gazetteer is as follows:—"Second, it was common to assign to the junior branches of a family certain lands for their support, instead of giving them the ancestral shares to which they were entitled. Such appanages were also known as *sir*."

The passage quoted from the Fyzabad Settlement Report runs thus:—"253. *Sir* is in most cases an appanage of proprietorship, the lands constituting the home-farm of a proprietor. It is the name, too, given to the lands assigned to the junior branches of a family in lieu of the ancestral share to which they were entitled."

The Judicial Commissioners did not overlook the fact that the passages which they quoted from the Oudh Gazetteer and

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the description *sir maqbuza* included mauza Chhauch (less Chak Khakra), and that under the will she took an estate for her life in the taluqa free of rent, and they gave her a decree declaring that she "is entitled to hold possession during her life of the village Chhauch, less Chak Khakra, pargana and district Kheri, under the will dated the 14th of June, 1907, executed by Thakur Rajindra Bahadur Singh, the late Taluqdar of Mahewa." From that decree Thakur Jai Indar Bahadur Singh has appealed to His Majesty in Council.

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After a careful consideration of all the facts in these consolidated appeals, their Lordships have come to the conclusions that the words *sirat maqbuza* in the will did apply to and cover not only *sir* lands which might be accurately described as "*sir*" but also mauza Chhauch (less Chak Khakra), and that Rajindra Bahadur Singh, in confirmation of his gift of 1911 to his wife, Rani Bijai Raj Kunwar, of mauza Chhauch (less Chak Khakra) rent-free for her life, did by his will intend to bequeath, and did bequeath, to her mauza Chhauch (less Chak Khakra) for her life as a proprietor, and without any liability to have it assessed to rent, and they also are of opinion that Thakur Jai Indar Bahadur Singh, who takes his interest in taluqa Mahewa under that will, and whose only title to any part of taluqa Mahewa is under that will, cannot repudiate the condition of the will that mauza Chhauch should be held by Rani Bijai Raj Kunwar for her life rent-free.

It has been contended on behalf of Thakur Jai Indar Bahadur Singh in these consolidated appeals that the decision of the Board in *Parbati Kunwar* v. *Deputy Commissioner of Kheri* (1) governs this case. That contention was based on a misconception. In that case the plaintiff, who sued for an enhancement of rent, was the "proprietor" of the mahal there in question within the meaning of section 107A of Act XXII of 1886 as amended by Act IV of 1901, and was suing a thekadar who held under a lease. In this case Thakur Jai Indar Bahadur Singh is not a proprietor of mauza Chhauch or of any part of it, and will not be the proprietor while Rani Bijai Raj Kunwar continues to be the proprietor for her life, and Act XXII of 1886 as amended by Act IV of 1901 does not apply.

(1) (1913) I L R, 40 All, 541; L R, 45 I. A., 111.

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BADRI NARAIN SINGH (PLAINTIFF) v. HARNAM KUNWAR AND OTHERS (DEFENDANT-)

[On Appeal from the Court of the Judicial Commissioner of Oudh].

Oudh Estates Act (I of 1869), section 28—Succession—"Ordinary law"—List 4—Male primogeniture sanad—Custom—Succession of widows—Evidence—Instances prior to sanad—Oudh Courts Act (XIV of 1895), section 3

An Oudh taluqdari estate was held under a male primogeniture sanad granted in 1863, and had been entered in list 4 prepared under section 8 of the Oudh Estates Act, 1869, that list comprising those taluqdars to whom section 23 was applicable. By section 28 intestate succession, except in the cases provided for by section 22, "is to be regulated by the ordinary law to which members of the intestate's tribe and religion are subject." Upon the death of the holder in 1907, intestate, his widow took possession, the appellant, who was the heir if the rule of succession the sanad applied, sued her and other members of the family to establish his title.

Held (1) that the words "the ordinary law" in section 28, like the similar words in section 22, clause 11, include the rule of succession laid down in the sanad by which the estate had been granted, (2) that evidence of instances of widows having succeeded prior to the sanad could not be used to set up an existing rule of succession directly contrary to the terms of the sanad, having regard to section 3 of the Government Grants Act, 1895; further, that a single instance later than the sanad was wholly insufficient to establish a custom in a branch of the family different from that in which the instance had occurred, and (3) that consequently the appellant succeeded.

Dictum in *Brij Indar Bahadur Singh* v. *Janki Koer* (1) and *Parbati Kunwar* v. *Chandarpal Kunwar* (2) explained.

Judgment of the Court of the Judicial Commissioner reversed.

APPEAL (No. 69 of 1920) from a judgment and decree of the Court of the Judicial Commissioner (2nd January, 1917), affirming a decree of the Subordinate Judge of Partabgarh (25th February, 1915).

The suit related to the succession to an Oudh estate of large value called Mahal Tajpur upon the death intestate of the holder in 1907. The estate had been granted in 1863 by a sanad by which on an intestacy it was to descend to the nearest male heir, according to the rule of primogeniture. The grantees had been entered in lists 1 and 4 prepared under section 8 of the Oudh Estates Act (I of 1869); list 4 being "a list of the taluqdars to whom the provisions of section 23 are

* *Present*:—Viscount CAVE, Lord SHAW, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1877) L. R., 5 I. A., 1, 18.

(2) (1907) I. L. R., 31 All., 457. L. R., 36 I. A., 125.

BADRI NARAIN SINGH (PLAINTIFF) v. HARNAM KUNWAR AND OTHERS (DEFENDANT.)*

P. C.* 1922 *May* 12

[On Appeal from the Court of the Judicial Commissioner of Oudh].

Oudh Estates Act (I of 1869), section 22—"Succession"—"Ordinary law"—List 4—Male primogeniture sanad—Custom—Succession of widows—Evidence—Instances prior to sanad—Oudh Estates Act (I of 1869), section 3.

An Oudh taluqdari estate was held under a male primogeniture sanad granted in 1863, and had been entered in list 4 prepared under section 8 of the Oudh Estates Act, 1869, that list comprising those taluqdars to whom section 22 was applicable. By section 22 intestate succession, "except in the cases provided for by section 22," is to be "regulated by the ordinary law to which members of the intestate's tribe and religion are subject." Upon the death of the holder in 1907, intestate, his widow took possession; the appellant, who was the heir if the rule of succession the sanad applied, sued her and other members of the family to establish his title.

Held (1) that the words "the ordinary law" in section 22, like the similar words in section 22, clause 11, include the rule of succession laid down in the sanad by which the estate had been granted, (2) that evidence of instances of widows having succeeded prior to the sanad could not be used to set up an existing rule of succession directly contrary to the terms of the sanad, having regard to section 3 of the Oudh Estates Act, 1869; further, that a single instance later than the sanad was wholly insufficient to establish a custom in a branch of the family different from that in which the instance had occurred, and (3) that consequently the appellant succeeded.

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the "ordinary law" as defined by the Oudh Laws Act (XVIII of 1876), namely custom and Hindu law He found, upon an elaborate consideration of the evidence, that if the plaintiff had established that the estate was impartible, he had failed to prove that widows were excluded, and he said that to his mind the defendant had proved the contrary.

1923, March. 17, 20, 21. Dunne, K. C., and Kenworthy Brown for the appellant.—

The appellant was the nearest male heir according to the rule of primogeniture, he was accordingly entitled to succeed under the sanad. The words "ordinary law" in section 22, clause 11, of the Oudh Estates Act, 1869, include the rule of succession laid down in a primogeniture sanad granting the estate: *Debi Bakhsh Singh* v. *Chandrabhan Singh* (1); see also *Sitla Bakhsh Singh* v *Sital Singh* (2). The similar words in section 23 have the same effect. *Brij Indar Bahadur Singh* v. *Janki Koer* (3), in which the Board referred to the sanad being superseded by the Act, related to an estate on list 2, and was distinguished on that ground in the case first mentioned above. *Parvati Kunwar* v. *Chandarpal Kunwar* (4) arose under list 4, but was decided on a finding as to that custom; the record shows that there was a sanad, but neither side relied on it because, being females, they both would have been excluded by its terms The fact that the grantees in the present case were not included in list 3 does not indicate that the limitations in the sanad do not govern the succession; they may well have desired that intestate succession to the estate should be governed under section 23 by the sanad, unaffected by the special limitations in section 22, which apply to list 3. The effect of section 3 of the Crown Grants Act, 1895, was to make the sanad control the succession: *Sheo Singh* v. *Raghubans Kunwar* (5). The custom alleged would restore one of the incidents of the Hindu law of succession which was expressly inapplicable by the terms of the sanad. Further, if the estate was impartible, the succession was by survivorship, therefore the

(1) (1910) I L R., 32 All., 599 . (3) (1877) L R., 5 I A., 1,13. L. R., 37 I A., 168.

(2) (1921) I. L R , 43 All., 245; (4) (1909) I. L R., 31 All , 457; L. R., L, R , 48 I. A., 228 38 I, A , 125.

(5) (1905) I L.R., 27 All., 634, L. R., 32 I. A , 203.

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(5) (1877) L. R., 5 I. A., 1,13.

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appellant as the senior in line was entitled: *Baijnath Prasad Singh* v. *Tej Bali Singh* (1).

De Gruyther, K. C., and *Dube* for the respondents.—

The last contention for the appellant clearly fails, because, having regard to the general confiscation in Oudh, the estate was self-acquired property; further, the case has proceeded on the basis that the family was divided. The sanad does not apply; the words of section 23 are clear, and preclude reference to the sanad in list 4 cases. The title does not rest upon the sanad, but upon the summary settlement; see letter of the 10th of October, 1859, paragraph No. 2 (schedule No. 1 to Act I of 1869). Lists Nos. 2 and 3 are exhaustive of the estates which by custom or the sanad are governed by primogeniture. Inclusion in list 4 shows that the succession was not to be by primogeniture; under section 9 the grantees could have transferred the estate to list 2. The pronouncement in *Brij Indar's case* (2) that the sanad was superseded by the Act should be given effect to in the present case. *Debi Bakhsh's case* (3) arose under list 5, not under list 4, and was therefore one in which under the Act itself primogeniture was to be the rule. The respondents are substantially supported by the decision in *Parbati Kunwar's case* (4), since that arose under list 4 and section 23, but was decided on custom without reference to the sanad. (Reference was also made to the further cases mentioned in the judgment in *Sitla Bakhsh Singh* v. *Sital Singh* (5), and to Sykes' Talukdari Law.)

Dunne, K. C., replied.

May, 12.—The judgment of the Judicial Committee was delivered by Viscount CAVE:—

This is an appeal by the plaintiff in the suit from a decree of the Court of the Judicial Commissioner of Oudh affirming a decree of the Subordinate Judge of Partabgarh by which the plaintiff's suit was dismissed. The question raised is as to the title to an estate in Oudh of considerable value known as the Mahal Tajpur.

(1) (1921) I. L. R., 43 All., 226: L. R., 48 I. A., 195.
(2) (1877) L. R., 5 I. A., 1, 18.
(3) (1910) I. L. R., 32 All., 599: L. R., 37 I. A., 168.
(4) (1909) I. L. R., 31 All., 457: L. R., 36 I. A., 125.
(5) (1921) I.L.R., 43 All., 245; L. R., 48 I. A., 228.

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Lal Ajodhia Bakhsh, the ancestor of the plaintiff, belonged to a family of Bisen Thakurs long settled in the district of Partabgarh, and was the owner of an estate called Kundrajit or Shamspur. At the time of the Mutiny, this family had four branches representing the descendants of the four sons of Lal Ajodhia Bakhsh; the first branch being represented by Thakurain Baijnath (a widow), the second by Lal Chhatarpal, the third by Lal Surajpal and the fourth by Lal Chandrapal. On the annexation of Oudh in 1856, this estate, with the remainder of the soil of the province, was confiscated by the British Government, which assumed the right (as stated in Lord Canning's Proclamation of the 15th of March, 1858), to dispose of it in such manner as it thought fitting. Lal Chhatarpal had taken action against the British Government, but Thakurain Baijnath had been loyal; and ultimately by a sanad, which is undated but which appears from other documents to have been executed in the year 1863, the Chief Commissioner of Oudh under the authority of the Governor General granted the estate of Kundrajit to the above-named four persons, Thakurain Baijnath, Lal Chhatarpal, Lal Surajpal and Lal Chandrapal, and their heirs, subject to the usual conditions as to the surrender of arms and loyalty to the British Government.

The sanad was in the form then commonly adopted and contained the following clause :—" It is another condition of this grant that, in the event of your dying intestate or of any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate, either in whole or in part by sale, mortgage, gift, bequest, or adoption to whomsoever you please."

Chhatarpal appears to have objected to the sanad on the ground that he was alone entitled to the whole estate, but it was ultimately accepted by him and by the other grantees.

On the passing of the Oudh Estates Act (Act I of 1869), the four grantees above-named (bracketed together) were entered as owners of Kundrajit in list 1 and list 4, as prepared under section 8 of the Act. There appears to have been no reason why they should not have been entered in list 3 as owners of an

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estate regulated by the rule of primogeniture; but they may have preferred not to be subject to the special rules of succession which, under section 22 (clauses 1 to 10) of the Act, apply to estates entered in that list. In any case, this is now immaterial, as the estate must be dealt with according to the rules regulating estates entered in list 4.

In or about the year 1872, Kundrajit was divided into four Mahals, which were allotted to the four branches of the family, Mahal Tajpur being allotted to Chhatarpal. The effect of this partition was that this Mahal was held by Chhatarpal alone as an impartible taluq on the terms of the sanad and of the Act of 1869.

Chhatarpal died on the 19th of October, 1899, and was succeeded by his son Lal Ram Kinkar. On the death of the latter without issue on the 6th of October, 1907, his widow, the first respondent, Thakurain Harnam Kunwar, took possession of Tajpur and the lands then held with it. Thereupon, the appellant, Babu Badri Narain Singh, who was the son of Chhatarpal's eldest brother and was the nearest male heir in line and degree, claimed to be entitled to the succession; and on his right being disputed he commenced, in 1913, the present suit against Thakurain Harnam Kunwar and other members of the family for possession of Tajpur and other lands. By his plaint, he claimed possession (*a*) under the terms of the sanad, (*b*) by an alleged family custom of succession by male lineal primogeniture, and (*c*) under a will executed by Chhatarpal on the 6th of September, 1899. This will, having been executed less than three months before the death of Chhatarpal, is now admitted to have been inoperative (under section 13 of the Act of 1869) to pass the estate, and it need not be further referred to.

The suit was heard by the Subordinate Judge of Partabgarh, who held that the alleged custom was not proved, and that having regard to section 23 of the Act of 1869, under which the succession on intestacy to a taluqdari estate entered in list 4 is to be "regulated by the ordinary law to which the members of the intestate's tribe and religion are subject," the succession in this case was to be regulated not by the sanad but by the law of the Mitakshara. He accordingly held that the widow of Lal Ram Kinkar was entitled to succeed, and dismissed the suit.

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On appeal the Judicial Commissioners differed on the question whether the sanad applied; but they agreed in holding that there was an established custom in the family that the widow should succeed, and that this custom continued notwithstanding the forfeiture and re-grant of the estate, and they accordingly affirmed the decision of the Subordinate Judge. Against this decision the present appeal was brought.

It is not and cannot be disputed that, if the rule of succession laid down in the sanad of 1803 is to have effect, the appellant as the nearest male heir is entitled to the succession; and in the argument for the respondents, the principal stress was laid upon the contention which prevailed with the Subordinate Judge, namely, that the effect of section 23 of Act I of 1869 was wholly to displace the rule of succession prescribed by the sanad and to substitute for it the ordinary rules of succession prevailing among Hindus who are subject to the law of the Mitakshara. This contention was disposed of by the First Judicial Commissioner in manner appearing by the following extract from his judgment:—"The meaning of the words 'ordinary law' has been the subject of much discussion in this case. It could not merely imply the personal law of the intestate's tribe and religion, because the personal law applicable to Hindus and Muhammadans has, in many instances, been modified and is controlled by the Indian Statutes. In the case of Hindus, for instance, the personal law of Hindus is controlled and governed in some respects by the Caste Disabilities Removal Act (XXI of 1850), the Hindu Widows' Re-marriage Act (XV of 1856), the Hindu Wills Act (XXI of 1870) and the provisions of the Transfer of Property Act (IV of 1882) and the Crown Grants Act (XV of 1895), wherever they are applicable. In the case of Muhammadans, the provisions of the Muhammadan law are similarly controlled and governed in some respects by the Transfer of Property Act (IV of 1882), wherever they are applicable. It cannot, therefore, be said that a reference to the 'ordinary law' in section 23 is merely meant to imply the personal law uncontrolled by custom or Acts of the Indian Legislature. As pointed out by Lord HOBHOUSE in a case of list 2 the effect of the 11th sub-section of section 22 is simply to refer the parties

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to the law which would govern the descent of the property when the special provisions of the Act are exhausted, and such ordinary law would include custom: *Bhai Narendar Bahadur Singh* v. *Achal Ram* (1). In *Parbati Kunwar* v. *Chandarpal Kunwar* (2) Lord COLLINS applied the same rule to a case of list 4, governed by section 23. In other words, when the special rules of succession laid down in section 22 are exhausted and section 22, clause (11), is reached, or when section 23 is applicable, the situation governing the succession has to be found apart from the Statute, that is, in the ordinary law applicable as if Act I of 1869 had not been passed. That ordinary law would include not only custom but also a *sanad*, where the *sanad* contains a rule of succession which is enforceable by Statute."

Their Lordships agree with the reasoning and conclusion of the First Judicial Commissioner; and indeed no other conclusion is consistent with the decisions of this Board in *Bhai Narendar Bahadur Singh* v. *Achal Ram* (1), *Debi Bakhsh Singh* v. *Chandrabhan Singh* (3) and *Sitla Bakhsh Singh* v. *Sital Singh* (4). These decisions clearly establish that the "ordinary law" referred to in the Act is the law which would govern the parties apart from the Statute and includes any sanad giving title to the property in dispute. It is true that these decisions were rendered with reference to clause 11 of section 22, and not with reference to section 23 of the Act; but the terms of the latter section are precisely similar to those of section 22(11), and their Lordships see no sufficient reason for giving to them a different construction. It may be added that the Oudh Estates (Amendment) Act, 1910, has no application to this case, which arose before that Act was passed.

An argument was founded, as in the cases cited, upon the dictum of Sir BARNES PEACOCK in *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (5), that in that case "the limitation in the sanad was wholly superseded by Act I of 1869, and that the rights of the parties claiming by descent must be governed by the provisions of section 22 of that Act." But it must be remembered that in that case (which arose under list 2) the contest

(1) (1893) I. L. R., 20 Calc., 649: L. R., 20 I. A., 77.
(2) (1909) I. L. R., 31 All., 457: L. R., 36 I. A., 125.
(3) (1910) I. L. R., 32 All., 599: L. R., 37 I. A., 168.
(4) (1921) I. L. R., 43 All., 245
(5) (1877) L. R., 5 I. A., 1, 18.

was between the female heir of the grantee (a widow) and the heir of her late husband, neither of whom could claim under the sanad; and this being so, the case is no authority for the view that the effect of section 22 (11), or of section 23 of the Act, was wholly to destroy the rules of succession laid down under sanads which had been so recently granted. Probably the dictum means no more than this, that the Act supersedes the sanad where the two are in conflict. Reliance was also placed on the case of *Parbati Kunwar* v. *Rani Chandirpal Kunwar* (1) which arose under list 4; but that case was argued (doubtless for good reasons) without any reference whatever to the sanad, and cannot, therefore, be taken as an authority on the question now under discussion.

In their Lordships' opinion, this argument fails.

With regard to the question of custom, the decision of the Judicial Commissioners appears to have been founded on certain instances in which the members of the family of Lal Ajodhia Bakhsh were succeeded by their widows, but all these instances, with one exception, occurred before the forfeiture of the estate in 1856 and the grant of a new title upon the conditions laid down in the sanad; and they cannot be used to set up a rule of succession directly contrary to the terms of the sanad under which the estate is now held. The Crown Grants Act of 1895, section 3, enacts that all provisions, etc., contained in a grant "shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding," and full effect was given to this enactment in *Sheo Singh* v. *Raghubans Kunwar* (2). The exception was in the case of the widow of Surajpal, one of the grantees under the sanad of 1863, who appears to have been allowed to take possession of his estate to the exclusion of his male heirs; but this single instance, which is unexplained, is wholly insufficient to establish a custom binding on another branch of the family. This argument, therefore, also fails, and the appellant's title prevails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed; that the decree

(1) (1909) I. L. R., 31 All., 457: L. R., 36 I. A., 125.

(2) (1905) I.L. R., 27 All., 634: L. R., 32 I. A., 203

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of the Court of the Judicial Commissioner and the decree of the Subordinate Judge should be set aside; and that the appellant should be held entitled to possession of Mahal Tajpur with any accretions thereto and to an account and payment of mesne profits. The respondents will pay the costs of the appellant in both courts and his costs of this appeal.

Appeal allowed.

Solicitor for appellant:—*Douglas Grant.*

Solicitors for respondent:—*T. L. Wilson & Co.*

APPELLATE CIVIL.

1921
November, 23.

Before Mr. Justice Piggott and Mr. Justice Walsh.

LACHMI PRASAD (APPLICANT) *v.* BALDEO DUBE AND OTHERS (OPPOSITE PARTIES).*

Act No. VIII of 1890 (*Guardians and Wards Act*), *sections* 29, 30, 47 *and* 48—*Appeal.*

No appeal lies from an order passed under section 30 of the Guardians and Wards Act, 1890.

THE facts of this case were briefly these:—

One Gopi Dube died possessed of some landed property, including some *sir* land. He left behind him certain minor heirs, who inherited the property subject to certain incumbrances. Their names were entered in the revenue papers, and their father, Mahabir Misir, was appointed guardian of their persons and property by the District Judge.

On the 26th of August, 1919, Mahabir Misir applied to the District Judge for permission under section 29 of Act VIII of 1890 to sell the property for Rs. 2,400 in order to clear off the debts due from the estate. On the 1st of November, 1919, while this application was still pending, one Baldeo Dube, one of the creditors, appeared before the District Judge and offered to pay Rs. 2,500 as sale consideration for the property.

On the 10th of December, 1919, the District Judge passed an order in favour of Baldeo Dube that the property be sold to him for Rs. 2,500.

Subsequently, Mahabir Misir, in contravention of the court's order of the 10th of December, 1919, gave a perpetual lease of the

* First Appeal No. 79 of 1921, from an order of Baijnath Das, District Judge of Ghazipur, dated the 14th of January, 1921.

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sir lands to Lachmi Prasad, the present appellant, and executed a sale-deed in favour of one Dwarka.

Upon this, the respondent, Baldeo Dube, applied to the District Judge for cancellation of the lease and the sale-deed.

The District Judge cancelled the lease by his order, dated the 14th of January, 1921.

From this order Lachmi Prasad preferred this appeal.

Munshi *Kamalakant Verma* for the respondents, took a preliminary objection that no appeal lay in this case. He submitted that, according to section 48 of Act VIII of 1890, an order made under the Act was final and could not be contested by suit or otherwise, save as provided by section 47 of the Act, or by revision. Section 47 of the Act enumerated specifically the orders under the Act from which an appeal could lie to the High Court. The section made no mention of an order passed under section 30 of the Act, under which section the order appealed from must be taken to have been passed and there was no ground for revision. Hence the order of the District Judge was final and it could not be interfered with.

Babu *Piari Lal Banerji*, for the appellant replied.

PIGGOTT and WALSH, JJ.:—We are satisfied that no appeal lies in this case, and we are not disposed to interfere in revision. The appeal is dismissed with costs.

Appeal dismissed.

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February 27.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad

GUJRATI (PLAINTIFF) *v.* SITAI MISIR AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order XXII, rule 9 (2)—Abatement of appeal—Necessity for formal order declaring appeal to have abated—Application to set aside order of abatement.

The abatement of a suit or appeal does not take place automatically, but it is necessary that there should be an order of the Court declaring the suit or appeal to have abated, and an application to set aside such an order was under order XXII, rule 9(2), of the Code of Civil Procedure. *Secretary of State for India* v. *Jawahir Lal* (1) followed. *Lachmi Narain* v. *Muhammad Yusuf* (2) overruled.

THIS was an application purporting to be one to set aside the abatement of an appeal. The facts of the case appear from the various orders below.

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* Application in Second Appeal No. 391 of 1920

(1) (1914) I. L. R., 36 All., 235. (2) (1920) I. L. R., 42 All., 540.

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GUJRATI v. SITAI MISIR.

Munshi *Kailas Chandra Mital*, for the appellant.

Dr. *S. M. Sulaiman* and Pandit *Narmadeshwar Prasad Upadhya*, for the respondents.

The application came first before a single Judge of the Court, who passed the following order:—

BANERJI, J.:—This application purports to be an application to set aside the abatement of an appeal. One out of several respondents to the appeal is dead, and no application was made within the period of ninety days allowed by law for bringing his legal representatives on the record. No order declaring that the appeal has abated either wholly or against the respondent who is dead has yet been passed. But before the passing of such an order the present application has been made on the ground that the applicant was not aware of the fact of the death of the respondent before the expiry of the ninety days. The application is opposed on the ground that it is premature inasmuch as no order declaring that the appeal has abated has yet been passed. In answer to this contention the ruling of a learned Judge of this Court, reported in I. L. R., 42 All., 540, has been cited. I have doubts as to the correctness of the view taken by the learned Judge in that case. I therefore direct that this application be laid before a Bench of two Judges.

The next order was by the Division Bench.

REYES and GOKUL PRASAD, JJ.:—This purports to be an application to set aside an order of abatement. It appears that one of the respondents died in March, 1921, and an application was put in by the learned vakil for the appellant after ninety days had expired. The learned vakil in the application stated that the appeal as against the deceased respondent had abated and he applied for an order under order XXII, rule 9 (2). The matter came before a learned Judge of this Court who was of opinion that the application was premature inasmuch as there was no order of the Court declaring the appeal to have abated. As, however, a learned Judge of this Court in *Lachmi Narain v. Muhammad Yusuf* (1), was of opinion that on the expiry of ninety days after the death of a respondent, if no application was made within ninety days to bring his representatives on to the record, the appeal automatically abated and it was not

(1) (1920) I. L. R., 42 All., 540.

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necessary that a formal order should have been passed to that effect before an application under order XXII, rule 9 (2), could be made. As the learned Judge before whom this application first came, doubted the correctness of the ruling, the matter was referred to two Judges and comes before us. It seems to us that the point is concluded by the decision in *Secretary of State for India* v. *Jawahir Lal* (1), and we think that that decision was correct. In order XXII, rule 9 (2), it is stated that the plaintiff may apply for an order to set aside the abatement or dismissal. It is quite obvious that a suit cannot be dismissed automatically. It seems to us therefore that a formal order declaring that a suit or an appeal has abated, is necessary before an application under this rule can be entertained. We therefore dismiss this application and order the appeal to be put up in the ordinary course. In order to save time we direct that the appeal be put up to-morrow before us for orders.

A formal order declaring the appeal to have abated as against one of the respondents was then passed:—

RYVES and GOKUL PRASAD, JJ.:—We are informed that in this case one of the respondents died more than three months ago and no steps have been taken to bring his legal representatives on the record. We declare this appeal to have abated as against him.

And the appellant presented a fresh application to set it aside:

RYVES and GOKUL PRASAD, JJ.:—This application has been presented by Mr. *Mithal* to-day. Mr. *N. Upadhiya* who represents the respondents is present. Let this matter be put up at an early date for disposal along with the previous application for setting aside the order of abatement disposed of by our order of yesterday.

In the end the order of abatement was cancelled:—

RYVES and GOKUL PRASAD, JJ.:—This is an application to set aside an order of abatement in an appeal pending in this Court. We are satisfied from the affidavit filed on behalf of the appellant that sufficient cause has been made out to explain why there was a delay in bringing the heirs of the deceased Babu Lakshmi Das

(1) (1914) I. L. R., 36 All., 385

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GUJRATI v. SITAL MISIR.

on to the record. We therefore allow the application, set aside the order of abatement and direct that the appeal be put up in the ordinary course. We make no order as to costs.

1922 February, 27.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

PARAS RAM SINGH (DEFENDANT) v. PANDOHI AND OTHERS (PLAINTIFFS.)*

Mortgage—Prior and puisne mortgagees—Prior mortgage foreclosed without puisne mortgagee being made parties—Rights of the two mortgagees inter se.

The owners of certain zamindari property, having mortgaged the same by way of conditional sale to the defendant, subsequently made a usufructuary mortgage of certain specific plots of land included in the first mortgage to the plaintiff. The defendant sued for foreclosure, but without making the plaintiffs parties to his suit, and having obtained a decree got possession of the mortgaged property. The plaintiffs then sought to redeem the prior mortgage: the prior mortgagees on the other hand pleaded that they ought to be permitted to redeem the plaintiffs.

Held that in the circumstances of the case and more particularly to prevent further litigation in future the equities of the case demanded rather that the defendant should be allowed to redeem the plaintiffs.

Hassanbhai valad Budhanbhai v. *Umaji bin Hiraji* (1), *Kedar Nath* v. *Saiyad Hafiz Ali* (2), *Charni* v. *Raj Bahadur* (3), *Musammat Ram Piari* v. *Raghunath Singh* (4) and *Kedar Prosanna Lahiri* v. *Girindra Prosad Sukul* (5) referred to.

THE facts of this case are set forth in the judgment of RYVES J.

Dr. *S. M. Sulaiman* and Dr. *Kailas Nath Katju*, for the appellant.

Munshi *Kamalakanta Varma*, for the respondents.

RYVES, J.—The essential facts, so far as they are necessary for the purposes of this appeal, can be stated very shortly. The mortgagor, who is no longer interested, by a mortgage by conditional sale, dated the 20th of September, 1900, mortgaged his zamindari share in four villages to the defendants. Subsequently, on the 15th of July, 1903, he executed a usufructuary mortgage in favour of the plaintiffs of three small plots of *sir*

* Second Appeal No. 385 of 1920, from a decree of G. C. Badhwar, District Judge of Ghazipur, dated the 10th of February, 1920, confirming a decree of Piare Lal Rastogi, Additional Subordinate Judge of Ghazipur, dated the 8th of March, 1919.

(1) (1908) I. L. R., 28 Bom., 152. (3) (1909) 2 Indian Cases, 495.
(2) (1907) 10 Oudh Cases, 366. (4) (1915) 29 Indian Cases, 794.
(5) (1908) 8 C.L.J., 178.

land for Rs. 99-15-6, and, on the 8th of July, 1904, he executed two other usufructuary mortgages in favour of the plaintiffs of some other small plots of *sir* and *khudkashi* land for Rs. 71 and Rs. 75 respectively. The aggregate area of these plots was a little over 3 bighas, that is, something more than an acre. All these plots of land were situated within the boundary of the village of Ukraon, one of the four villages mortgaged to the defendants. These three usufructuary mortgages were all unregistered. The terms of all of them were similar. The mortgagees undertook to pay the Government revenue, and the profits were set off against the interest. It was agreed that the mortgages could be redeemed at the end of the month of Jeth in any year on payment of the principal money.

In 1907 the defendants brought a suit for foreclosure of the mortgage of 1900 against the mortgagor and obtained a decree, which was made absolute in 1908, and thus they obtained eventually possession of the mortgaged property. The plaintiffs, the puisne mortgagees, were not made parties to that suit. Thereafter the defendants sought to eject the plaintiffs in the revenue court, describing them as their tenants. They pleaded that they were usufructuary mortgagees, and, on being referred to the civil court, obtained a decree from the civil court declaring them to be usufructuary mortgagees. This was on the 21st of May, 1917. On the 6th of August, 1918, the plaintiffs served a notice on the defendants of their intention to sue for redemption of the prior mortgage of 1900. On the 30th of August, 1918, the defendants deposited in court under the provisions of section 83 of the Transfer of Property Act the entire amount due to the plaintiffs on the three subsequent usufructuary mortgages, offering to redeem them. The plaintiffs refused to accept the money, and on the 10th of September, 1918, filed this suit praying to be allowed to redeem the prior mortgage of 1900 on payment of "the amount which the court considers genuine and valid" and that "they may be put in possession of the property comprised in the prior mortgage together with the *sir* land appertaining thereto". The defendant No. 1 contested the suit on three grounds. The first two need not be considered. The third ground taken was: "To avoid future dispute and to put a stop to the litigation, he (the defendant) had deposited the whole

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PARAS RAM SINGH v. PANDEH.

Eyre, J.

amount due to the puisne mortgagees on their mortgages and asked them to give up possession and that although they had refused this offer, he was still willing to pay them everything due under their mortgages." On these pleadings the trial court framed, among other issues, issue No. 6 :—"Have defendants got a right to redeem the mortgages in favour of the plaintiffs? Have defendants been ready to pay the mortgage money due to plaintiffs? If so, how does it affect the claim?" On this issue, the only one with which we are concerned, it held: "Defendants appear to have deposited the mortgage money due to the plaintiffs in court under section 83 of Act IV of 1882, and they claim that they have got a preferential right of redemption. This view, though countenanced by the Bombay High Court, is opposed to the views of the other High Courts (*vide* Gour's Transfer of Property Act, page 1130, fourth edition, and the rulings cited on that page). The learned author observes: 'If the Bombay view be correct, the prior mortgagee would steal a march over the subsequent mortgagee by keeping him ignorant of the suit in which he acquires the mortgagor's interest.'" I went on to find that inasmuch as the plaintiffs had not been made parties in the foreclosure suit, the plaintiffs had a preferential right to redeem; and it gave them a decree for redemption on payment, not of the amount claimed by the plaintiffs, namely Rs. 3,282-12-0, but of Rs. 4,929-6-0, which included a sum of Rs. 1,400 which the defendants had to pay in their suit to redeem a still earlier mortgage. The defendant No. 1 appealed, and in paragraph 4 of his memorandum of appeal put his case in the following words :—"Legally the appellant as representative of the mortgagor and also as prior mortgagee has a right to redeem the mortgages in favour of the plaintiffs. The appellant with a view to do away with future disputes, has already deposited, under section 83 of Act IV of 1882, the mortgage consideration due to the plaintiffs in a competent court, but they, as a precautionary measure, instituted this suit. Having regard to the entire circumstances, the defendant's prayer as to the redemption of the plaintiffs' mortgages was fit to be allowed, and, in this case, a decree for redemption in favour of the defendant should have been prepared. Such a decree is not prejudicial to the plaintiffs, and the one for redemption passed by the court is

materially injurious to the defendant's right." The learned Judge of the court below sets out as one of the two points for his decision, as follows, "that the defendants appellants (*sic*) who were once prior mortgagees were now the owners of the equity of redemption and were, therefore, entitled to redeem the plaintiffs' mortgages." Unfortunately, as it seems to me, when he comes to discuss this proposition in his judgment, he changes the phraseology of the issue as he had originally expressed it and asked himself, "the second point for decision is whether the subsequent mortgagees have a preferential right of redemption over a prior mortgagee who has obtained a decree for foreclosure", and he then goes on to hold that the plaintiffs, not having been made parties in the former foreclosure suit, cannot in any way be affected by what happened in that suit, and, finally, after discussing some rulings to which I shall refer later, accepted the dictum of Dr. Gour already quoted and dismissed the appeal. The defendant No. 1 comes here in second appeal, and his first ground is that the learned District Judge has overlooked the fact that although the subsequent mortgagees are entitled to redeem the prior mortgage, the prior mortgagees, who have already acquired the mortgagor's right by foreclosure, can after such redemption claim redemption of the subsequent mortgage.

It seems to me most unfortunate that the courts below should have asked themselves which of the parties had "the preferential" right to redeem. It seems to me clear beyond any controversy that both had a right of redemption. I prefer to regard this litigation as being substantially two cross-suits which might well have been consolidated, as indeed they were for all practical purposes, having regard to the pleadings and issue No. 6 framed by the trial court and reiterated in the appellate court and tried out in both courts. I think paragraph 21 of the written statement already quoted may be regarded as substantially a plaint in such a cross-suit. I think this litigation really involves two suits: (1) by a puisne mortgagee to redeem a prior mortgagee who had not made him a party in his suit on his own mortgage, and (2) by a person who had become the owner of the mortgaged property, and who had acquired the equity of redemption and, therefore, stands in the shoes of the mortgagor, to

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PARAS RAM SINGH v. PANDOHI.

Ryves, J.

redeem an encumbrance. It seems to me that both are, *prima facie*, entitled to what they claim, and the question for the court under such circumstances, when all the parties were before it and all the necessary evidence was on the record, was to decide once and for all, having regard to the equities of the parties and to prevent further litigation, what the justice of the case demanded. In this view, what I think we have to look at in this appeal, is not whether the decisions of the courts below were legally correct, but whether we should now do what I think the courts below should have done. Look at the consequences. If we uphold this decree, the plaintiffs pay the decretal amount to the defendants and the next day the defendants will inevitably file their suit to redeem the plaintiffs and so recover the property. All that the plaintiffs are entitled to is to get back their mortgage money. After all, they are merely mortgagees and, as such, are liable to be redeemed by the owner of the property, that is, the mortgagor or whoever represents him. In this case the prior mortgagees, the defendants, having acquired the equity of redemption, stand in the shoes of the mortgagor and are the owners of the property. I should be content to stop here and base my decision on what seems to me to be required by the equities of the case. But as it has been very ably argued on behalf of the respondents that the decisions of the various courts, except the Bombay decision, are opposed to my view, I think I should consider those authorities. The Bombay case, namely, *Hassanbhai valad Budhanbhai* v. *Umaji bin Hiraji* (1), it is conceded, is an authority in favour of the appellant, but it is argued that the facts there were different, that the decision itself is unreasonable and that it has not been followed by other courts. In the Bombay case the mortgagor brought a suit to redeem the prior mortgage and got a decree but failed to pay the decretal amount within the time ordered, and, consequently, the mortgage was foreclosed. Then the subsequent mortgagee brought a suit for sale on his mortgage, thereby, it is said, offering the prior mortgagee the option of redeeming him. Although the facts are different, I do not think the principle of law involved is substantially different. Next, it is said that the decision of the Bombay Court

(1) (1908) I. L. R., 28 Bom., 158.

is unreasonable, because if the puisne mortgagees had been made parties in the former suit, as they should have been made, they would have had an undoubted right to redeem the prior mortgage, and it is said the prior mortgagee must not be allowed to take advantage of his own fault by depriving the subsequent mortgagees of their right to redeem the prior mortgage. This, I think, puts Dr. Gour's dictum, already quoted, in other words. Although it has been held that a subsequent mortgagee who should have been made a party to the suit on a prior mortgage but had not been made a party, cannot in any way be affected by the decree in that suit, and cannot be put in a worse position than he would have been in if he had been made a party, on the other hand, it seems to me, he cannot be put in a better position than he would have been in if represented then. If he had been made a party to the former suit, no doubt he could have redeemed the prior mortgage, but he would not thereby have obtained possession of the property. What he now claims is, that, not having been made a party to the former suit, that decree must be considered a nullity, and that he is now entitled on redeeming the prior mortgage to become the owner of the whole property originally mortgaged. This, manifestly, he cannot do. The result of the former suit undoubtedly was to vest the ownership of the property in the defendants and, as such, they must have a right to redeem the plaintiffs. The last argument is that the other High Courts have not followed the Bombay decision. It seems to me that this argument is based on the head-note to the Bombay case which is very misleading. According to that it was "*Held*, reversing the decree, that H, the prior mortgagee, had a right to redeem superior to that of U, the subsequent mortgagee." Put baldly like that, it is most misleading. The High Court never held anything of the kind. What they did hold was, as reported on page 160: "Looking to the substance and not to the form of the suit, the plaintiff was clearly seeking relief on the basis of the right of a mortgagee. When the pleadings were complete it appeared that his mortgage was subsequent in date to that which Hassan had taken of the same lands and had foreclosed. The contest thus became one between, on the one hand, a prior mortgagee in possession who had obtained a decree absolute for foreclosure and, on the

necessary to refer more specifically to any other of the many decisions which have been brought to our notice, except perhaps the case of *Kedar Prosanna Lahiri* v. *Girindra Prosad Sukul* (1). There the contest was between the first mortgagee and the second mortgagee who had both brought suits on their mortgages without making the other a party, and on getting a decree had purchased the mortgaged property, and it was there held that each party was entitled to redeem the other, but the preferable right to redeem was with the plaintiff who, in that case, was the subsequent mortgagee. The point now before us was not argued or decided and no cases were referred to. As I have already said, the decision of the courts below in this case was legally right, but I do not think it was the proper decision to give having regard to all the circumstances of the case and the pleadings of the parties. I would, therefore, allow the appeal and allow the defendants to redeem the plaintiffs' mortgages, on payment to them of the sum due on their mortgages in the next month of Jeth. If they fail to do so, I would dismiss the appeal.

GOKUL PRASAD, J.—I agree in the order proposed and in the judgment of my learned brother. I have only to state that the result of our dismissing this appeal would be to prolong this litigation. If the plaintiffs are allowed to redeem the prior mortgage in favour of the defendant who has now acquired the equity of redemption, the result would be that the defendant prior mortgagee purchaser will bring a suit to redeem the puisne mortgage in favour of the plaintiffs and would get back the property on payment of the amount due under the plaintiffs' mortgages as also the amount which he has received from the plaintiffs in satisfaction of his prior mortgage, or in other words, the defendant would be placed back in the same position in which he would have been if he had been allowed to redeem the plaintiffs. Besides this, the plaintiffs would be in no better position by redeeming the mortgage in favour of the defendant. They would have after redemption their three bighas odd free from the mortgage and would only have a charge on the balance of the mortgaged property for the proportionate amount which they would have had to pay over and above the proportionate share

(1) (1903) 8 C. L. J., 173.

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(1) (1905) 8 C. L. J., 173.

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RAO NARSINGH RAO v. BEGU MATA LAKSHMI BAI.

MEARS, C. J., and BANERJI, J.:—This is an application by Rao Narsingh Rao for leave to appeal to His Majesty in Council.

The case is a very important one and the position of the applicant is such as to enlist the sympathy of every one acquainted with his history.

Rao Narsing Rao commenced an action against one Rani Kishori on the allegation that he was entitled to property of the value of upwards of fifty lakhs because he was the son of Rao Balwant Singh and Musammat Dunaju. Rao Balwant Singh and Musammat Dunaju were husband and wife. His allegation that he was the son of Musammat Dunaju was the main essential fact to be proved. The Rani Kishori denied it and set up that Rao Narsingh Rao was in fact the son of one Shekhar Singh. In the lower court and here Rao Narsingh Rao failed to prove that Musammat Dunaju was his mother, and there are thus two concurrent findings against him.

We have listened very carefully to Mr. *Nihal Chand's* arguments with complete readiness to grant the application if that could consistently and properly be done.

Mr. *Nihal Chand* argues that the Court ought to have applied the provisions of section 112 of the Evidence Act and he formulates his case in this way. He says that when the defendants had failed to establish the case which they set up that Rao Narsingh Rao was the son of Shekhar Singh, thereupon there arose a conclusive presumption that Rao Narsingh Rao was the son of Musammat Dunaju by her husband Rao Balwant Singh. We have pointed out elsewhere that the defendants were under no obligation to prove the paternity of Rao Narsingh Rao. It was for him to prove that he was the son of Musammat Dunaju.

He has cited to us the cases of *Narendra Nath Pahari* v. *Ram Gobind Pahari* (1) and *Tirlok Nath Shukul* v. *Lachmin Kunwari* (2). It will be noticed that in both those cases the Privy Council found as a fact that the lady had in fact given birth to a child and then on proof that the other requirements of the section were complied with, the conclusive presumption arose.

Had Rao Narsingh Rao been able to prove that Musammat Dunaju had on the 2nd of March, 1894, given birth to a child,

(1) (1901) I. L. R. 29 Calc., 111. (2) (1903) I. L. R. 25 All, 408

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SUSHIL CHANDRA DAS AND COMPANY v. SUKHANAL, BANSIDHAR

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Babu *Lalit Mohan Banerji* and Babu *Indu Bhushan Banerji*, for the applicant.

Mr *B. E O'Conor*, Mr. *G. W. Dillon*, Dr. *Surendra Nath Sen*, Dr. *Kailas Nath Katju* and Munshi *Durga Prasad*, for the opposite party.

PIGGOTT, J.—These are connected applications to file two awards, purporting to be made on the 12th of November, 1920, at the close of proceedings taken under the Indian Arbitration Act in connection with a trade dispute between two firms. It is one of a number of connected applications which would, in the ordinary course of things, have been filed in the court of the District Judge of Cawnpore, but were transferred to this Court with the consent of the parties, to be disposed of in the exercise of its original jurisdiction, because of the importance to the commercial community of some of the questions involved.

The firm in whose favour the awards have been made, that of Sushil Chandra Das & Co., which may conveniently be spoken of as the plaintiff firm, are importers of piece-goods from Manchester. The defendant firm, that of Sukhanal, Bansidhar, deals in the said goods, but does not import on its own account. On the 24th of August, 1918, the defendant firm placed in the hands of the plaintiff firm two indents drawn up on a form published by the Delhi Piece Goods Association; one indent was for one hundred bales of red shirting, the other for twenty-five bales of white lawns. On the 2nd of September, 1918, the plaintiff firm wrote intimating their acceptance of the former order, and on the 4th of September, 1918, they similarly accepted the latter. It is admitted that the conclusion of the Armistice on the 11th of November, 1918, was followed by a heavy fall in the price of piece-goods in the Indian market. On the 24th of November, 1918, the defendant firm wrote to the plaintiff firm begging the latter to arrange with their "suppliers at home to expunge these orders from their books", and offering to pay "nominal damages" in return for this favour. Further correspondence

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SUSHIL CHANDRA DAS AND COMPANY v. SUKHAMAL, BANSIDHAR. *Piggott, J.*

followed; and on the 20th of January, 1919, the defendant firm wrote repudiating liability on the ground that there had never been any completed contract of sale between the parties. The plaintiff firm claimed to have the dispute referred to arbitration under the terms of clause 15 of the conditions endorsed on the printed form of tender which the defendant firm had used. The latter took up the position that, inasmuch as there had never been any completed contract between the parties, it necessarily followed that they were bound by no agreement to refer anything to arbitration. One attempt at obtaining a decision through a single arbitrator failed, the District Judge holding that the conditions necessary to entitle the one arbitrator nominated by the plaintiff firm to proceed to the delivery of an award had not been fulfilled: this order was upheld by this Court in a judgment dated the 9th of August, 1920. A supplementary award, which the same arbitrator had delivered while the proceedings relating to the filing of his first award were pending, was finally withdrawn by the plaintiff firm from the court of the District Judge, on the very proper view that it had become ineffective owing to the decision affirmed by this Court's order of the 9th of August, 1920. The plaintiff firm, however, has proceeded upon certain principles laid down in the order above referred to; it has assumed that the submission to arbitration is effective and subsisting, and has accordingly made another attempt to carry it into effect. On the 20th of August, 1920, they sent the other side notice that they desired to submit the entire dispute to arbitration and again nominated Mr. J. C. Roberts, President or Chairman of the Committee of the Delhi Piece Goods Association, as their arbitrator. The defendant firm, under protest and without prejudice to their contention that they were not bound to go to arbitration at all, nominated Mr. A. C. Khosla. The two arbitrators held a single meeting at Delhi, on the 27th of September, 1920. Mr. Khosla suggested the adjournment of the proceedings to a later date, on the strength of a telegram which he had received, to the effect that the party nominating him was not ready with its evidence. Mr. Roberts took a very strong view that the defendant firm was merely trying to evade any effective arbitration, or in any case to spin out the proceedings until the expiration of a period of three months from the date of this

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Court's order of the 9th of August, 1920, should enable them to withdraw a considerable sum of money which they had deposited in the District Judge's court: he definitely refused to adjourn and the arbitrators separated without having decided anything. A memorandum of their proceedings on that date was drawn up and signed by both of them. There has been a conflict of evidence between Mr Roberts and Mr. Khosla as to whether or not they ever got so far as discussing the merits of the dispute or the appointment of an umpire to adjudicate on the same upon their failure to agree: they certainly did differ on the question whether they should or should not proceed at once to pronounce a decision upon the materials available, and they did separate without appointing an umpire Mr. Roberts proceeded at once to draw up a paper which has been loosely described as his "award", it is of course a statement of his opinion on the dispute drawn up for the consideration of the umpire. On the 1st of October, 1920, Mr. Khosla similarly drew up a statement of his own. The plaintiff firm applied to the Committee of the Delhi Piece Goods Association to appoint an umpire Notice of the application was sent to the opposite party; and, on the 30th of October, Mr Gur Prasad Kapur wrote to them to say that he had been appointed umpire and had fixed the 12th of November, 1920, for deciding the matter. On that date he delivered the two awards sought to be filed; they adopt in its entirety the opinion formed by Mr. Roberts and award the plaintiff firm an ascertained sum by way of damages for the breach of contract of which the defendant firm is held guilty.

The objections taken to the filing of the award may now be stated and disposed of *seriatim*.

(1) It is contended that there was never any completed contract between the parties, and consequently no binding agreement to submit disputes arising out of the contract to arbitration. This argument is based upon the wording of two letters of the 2nd of September, and 4th of September, 1918, by which the plaintiff firm intimated their acceptance of the two indents received from the defendant firm. In each case the letter begins with the words:—"We have the pleasure to accept your indent"; then follow particulars which are a mere repetition of the conditions specified in the indent under reply, and finally comes the

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phrase upon which the dispute has hinged:—"The above-mentioned acceptance is subject to revision and confirmation by mail if required." For the plaintiff firm Mr. Sushil Chandra Das himself has gone into the witness-box and given evidence as to the ordinary course of business. He was a somewhat confused witness, and over-ready to make sweeping assertions which subsequently required qualification: but I have no doubt he was trying to speak the truth to the best of his ability. He repudiated the suggestion which his own counsel had put forward, to the effect that the indents signed by the defendant firm must be regarded as completing and recording a contract, inasmuch as they were acceptances of offers orally made on behalf of the plaintiff firm. Nevertheless I am satisfied that there had been negotiations between the parties and a provisional agreement arrived at before the signatures of the defendant firm were put to the two indents. The mere fact that the written entries on the indent forms, apart from the printed matter, are in the handwriting of the manager or agent of the importing firm is strong corroboration of the evidence of Sushil Chandra Das on the point. The indents are in effect promises by the defendant firm to take delivery of certain goods and to pay for them at certain rates, subject to certain specified conditions, and subject also to the plaintiff firm's intimating within the prescribed period (twelve days in the case of indent No. 898 and five days in the case of indent No. 899) that they had ascertained by cable from their Manchester correspondents that the latter could supply the goods to enable the plaintiff firm to perform its part of the contract according to its terms. The reply of the plaintiff firm in each case is to the effect that the necessary cable has been sent and reply received, and that the bargain is concluded, subject only to this reservation, that the terms may have to be revised or the bargain confirmed on arrival of the English mail containing the reply of the Manchester correspondents. Such "revision and confirmation" is to remain open until the arrival of the mail, "if required". In their context these words can only be understood as meaning, "if circumstances should arise making such revision or confirmation necessary." The circumstances contemplated by both parties are clearly stated in the sixteenth clause of the printed form of indent, a clause which by

virtue of the signature of the defendant firm became part of the contract between the parties. This clause stipulates that "It is distinctly understood between the sellers and the buyers in India that offers if accepted by telegram are subject to revision and confirmation by mail only if any mistake has been made in the telegram." The following statements made by Sushil Chandra Das in his deposition seem to me obviously true in fact and a correct statement of the nature of the contract entered into, as it was understood by both parties: -

"In this transaction there was no mistake in the cables to England between me and my English correspondents. When the mail is received from England and shows that there has been no mistake in the cables, there is nothing for me to confirm to the purchasing firm. The acceptance by cable binds me to everything, to all the terms stated in the indent, except in the event of a telegraphic error in transmission."

That is to say, there was a complete and binding contract between the parties, subject only to the possible discovery that an event had occurred which was not within the control of either party, an error by the telegraph department in the transmission of the cables sent by the plaintiff firm to its home correspondent or received by the former from the latter. This event did not occur and the discovery was never made.

I am not impressed with the argument that this Court has already come to a decision upon the question now in issue in another litigation, namely in F. A. 438 of 1917, decided on the 2nd of December, 1920. In that case the reservation in the letter of acceptance did not contain the qualifying words "if necessary," and the Court had not before it the evidence available to us as to the regular course of business.

In the present case I have no doubt the parties were absolutely *ad idem* when the plaintiff firm wrote and the defendant firm received the letters of the 2nd of September, and 4th of September, 1918, that there was a completed contract, and that under this contract the defendant firm is under an obligation to submit this dispute to arbitration in the manner provided by the printed conditions on the indent form.

(2) Another point taken is that the awards sought to be filed are null and void because the umpire who delivered them

and to claim for the difference between the selling price and the contract price. It was put to us that this clause contains the stipulated penalty under the contract for any failure on the part of the buyers in India to accept delivery, and that it operates as a condition precedent to the arbitration clause (No. 15), so that no reference to arbitration could take place until the plaintiff firm had given due notice and had actually sold the goods by public auction. From another point of view we were asked to hold that it amounted to "misconduct" on the part of the umpire to assess the damages payable by the defendant firm upon a different basis and without compelling the importers to prove at least an actual re-sale of the goods whether by public auction or otherwise. I am quite satisfied that the provisions of clause (3) of the indent form are not a condition precedent to the operation of clause (15). The latter opens with the words:—"Any claim or dispute arising in connection with this contract, including claims or disputes in connection with non-delivery," and these words are in my opinion decisive. It also seems to me that the provisions of clause (3) do no more than authorize the importers to take certain action in a certain event, without thereby shutting them out from any other remedy lawfully open to them. Finally, I regard the question as one for the determination of the arbitrators (or umpire), whose decision is "final and binding on both parties": the umpire was within his jurisdiction in interpreting the terms of the contract, and in deciding that the plaintiff firm could support a claim for damages apart from the special provisions of clause (3).

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(5) There was some further argument addressed to us against the proceedings of Mr. Roberts and of the umpire with a view to founding a charge of "misconduct" against the latter. I think it unnecessary to say more than that nothing approaching a case of "misconduct" was in my opinion made out.

For these reasons I would overrule all the objections of the defendant firm and order the two awards in question to be filed so that they may become operative as decrees of court, the said defendant firm to pay all costs.

WALSH, J.:—I agree in holding that the respondents, Sukhamal, Bansidhar, submitted in writing to arbitration, and that no case is made out for refusing to file the award.

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WALSH, J.:—I agree in holding that the respondents, Sukhamal, Bansidhar, submitted in writing to arbitration, and that no case is made out for refusing to file the award.

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The main question turns upon the interpretation of the two alleged letters of acceptance written by Sushil Chandra Das, dated the 2nd and 4th of September, respectively. In terms these acceptances are conditional. But the condition contains a latent ambiguity in the words "if required." Required by whom, or what? The parol evidence as to the previous course of business satisfies me that the words meant, and were understood and intended by both parties to mean, 'if required by some telegraphic mistake between England and India for which neither of the contracting parties was responsible.' The elliptical form of words adopted had frequently been used and acted upon in previous contracts between the same parties. In other words it meant 'subject to the operation of clause 16 of the terms of your offer.' It is a dangerous mode of acceptance. It is in fact tautologous. The operation of clause 16 could not be excluded if an absolute acceptance had been given, unless its exclusion had been expressly stipulated for. The condition is therefore what is generally known as a condition subsequent. The case seems to me to be covered by section 33 of the Indian Contract Act. The "uncertain future event" was the discovery of some telegraphic error. The happening of that event became impossible when the mail confirmed the original terms as communicated by telegram, and the contract thereupon became enforceable. This case is clearly distinguishable upon the facts from the case, First Appeal No. 438 of 1917, decided by a Bench of this Court, where the words "if required" did not occur, so that the condition was in general terms, and a question in fact arose as to a change of colour in the goods to be supplied under the indent.

I do not agree with the contention urged before us by the applicants that the decision of the question whether there has been a completed contract so as to bind the parties to submission in writing rests with the arbitrators. Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the courts. If *Alibhoy Mahomed* v. *Baijnath Kalooram* (1) decided otherwise, I disagree with the decision.

On the other hand, I think that, once the contract is proved, the interpretation of its terms, such as clause 3 of this contract, is a question for the arbitrators alone.

(1) (1919) 24 C. W. N., 567.

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There seems to me to have been jurisdiction to appoint the umpire in this case, though I strongly disapprove of the conduct of Mr. Roberts, who, as an arbitrator and a partisan, who had formed a strong view, should not have consented to preside over the meeting which appointed the umpire. His position as President of the Delhi Piece Goods Association makes it undesirable that he should act as arbitrator at all in disputes where he may be called upon to intervene also in a quasi-judicial capacity as the presiding official of the association which appoints the umpire. If I were convinced that the umpire had allowed himself to be influenced in arriving at his decision by anything done by Mr. Roberts other than what may legitimately be done by an arbitrator in laying his view of the controversy before an umpire, I should hold that there had been misconduct; but I recognize that the position was rendered a difficult one by the conduct of the respondents themselves and of their arbitrator. They are clearly bound by the arbitration clause, and they did their best to wreck the proceedings.

Applications allowed.

ORIGINAL CIVIL.

Before Mr Justice Piggott and Mr. Justice Walsh

KEDARNATH, MOHLAL (APPLICANT) v. SUKHAMAL, BANSIDHAR (OBJECTOR).*

1922 *March*, 9.

Arbitration—Contract making it obligatory on parties to prefer claims within stated time—Claim not made within time—Award made in despite of condition not upheld.

The terms of a contract of sale provided that disputes between the parties should be settled by arbitration. But they also provided that "no claim or dispute of any sort whatever can be recognized if not made in writing within 60 days from due date of payment." The buyers refused to take delivery; and the sellers claimed damages, but did not put in their claim in writing within 60 days. The matter went to arbitration and the umpire, notwithstanding the clause cited above, decided that the claim was not barred, and made an award in favour of the sellers.

Held, on an application to file the award, that the award of the umpire was not the decision of a tribunal to which the buyers' claim was bound, under the terms of their contract, to submit.

THE facts of this case sufficiently appear from the judgment of PIGGOTT, J.

* Original Suit No. 3 of 1921.

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KEDARNATH, MOTILAL v. SURAMAL, BANSIDHAR.

Piggott, J.

(2) There is, however, another difficulty in the way of the plaintiff firm. According to clause (14) of the printed form of indent which is the basis of the contract between the parties, "No claim or dispute of any sort whatever can be recognized if not made in writing within sixty days from due date of payment." The first letter written by the plaintiff firm, after the defendant firm had refused delivery and repudiated the contract, in which the former prefer any claim for damages is one dated the 13th of April, 1920, [illegible] more than sixty days after due date of payment in respect of the very latest of the indents concerned. The umpire has considered this point: he says, in effect, that the clause above quoted refers to claims put forward or disputes raised by the buyers and has nothing to do with any claim by the sellers for damages for breach of contract. It must be remembered that clause (8) of the indent form provides the sellers with a prompt and effective remedy against failure on the part of the buyers to accept delivery: if the plaintiff firm had chosen to avail themselves of this remedy we should have had a "claim" on their part well within the prescribed period of limitation. They chose not to avail themselves of this remedy and to fall back on their rights under the ordinary law as the vendors under a contract of sale which the vendees had repudiated and refused to perform. The question is, whether the plaintiff firm, having done this, can claim the benefit of the arbitration clause, which is No. 15 in the indent form, without first fulfilling the obligation imposed upon them by clause 14, that is to say, without preferring a claim in writing within the prescribed period of sixty days. On the contract as it stands, nothing could well be plainer than the expression "No claim or dispute of any sort whatever" used in clause 14. We were asked to consider the terms of the contract as a whole; and on doing this it seems to me impossible to avoid the inference that the condition laid down in this clause was intended as a condition precedent to the operation of clause 15. It was urged that the arbitrator was in a better position than this Court can be to understand the ordinary course of business in this matter and the intention of the parties when entering into this contract. If this point is seriously pressed, it seems to me that we cannot altogether shut our eyes to the fact that the umpire represents the

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KEDAR-NATH, MOTI LAL v. SUKHAMAL, BANSIDHAR.

Piggott, J.

(2) There is, however, another difficulty in the way of the plaintiff firm. According to clause (14) of the printed form of indent which is the basis of the contract between the parties, "No claim or dispute of any sort whatever can be recognized if not made in writing within sixty days from due date of payment." The first letter written by the plaintiff firm, after the defendant firm had refused delivery and repudiated the contract, in which the former prefer any claim for damages is one dated the 13th of April, 1920, considerably more than sixty days after due date of payment in respect of the very latest of the indents concerned. The umpire has considered this point: he says, in effect, that the clause above quoted refers to claims put forward or disputes raised by the buyers and has nothing to do with any claim by the sellers for damages for breach of contract. It must be remembered that clause (3) of the indent form provides the sellers with a prompt and effective remedy against failure on the part of the buyers to accept delivery: if the plaintiff firm had chosen to avail themselves of this remedy we should have had a "claim" on their part well within the prescribed period of limitation. They chose not to avail themselves of this remedy and to fall back on their rights under the ordinary law as the vendors under a contract of sale which the vendees had repudiated and refused to perform. The question is, whether the plaintiff firm, having done this, can claim the benefit of the arbitration clause, which is No. 15 in the indent form, without first fulfilling the obligation imposed upon them by clause 14, that is to say, without preferring a claim in writing within the prescribed period of sixty days. On the contract as it stands, nothing could well be plainer than the expression "No claim or dispute of any sort whatever" used in clause 14. We were asked to consider the terms of the contract as a whole; and on doing this it seems to me impossible to avoid the inference that the condition laid down in this clause was intended as a condition precedent to the operation of clause 15. It was urged that the arbitrator was in a better position than this Court can be to understand the ordinary course of business in this matter and the intention of the parties when entering into this contract. If this point is seriously pressed, it seems to me that we cannot altogether shut our eyes to the fact that the umpire represents the

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views of the Delhi Piece Goods Association, that is to say, of the importing firms, who are vitally interested in throwing the burden of the loss consequent on the slump in the Indian market after the 11th of November, 1918, as far as possible, on the "buyers in India", rather than on the importers. In any case the duty is cast upon this Court of interpreting the terms of the contract, and I do not see how we can agree to twist the plain language of clause 14 into something wholly different. Finally it was contended that the point was one for the decision of the arbitration tribunal and that we are not sitting as a court of appeal from the arbitrators or umpire. This last proposition is correct, and I have endeavoured studiously to bear it in mind throughout; but when the Court is asked to file an award it must determine whether the document propounded as such is the production of an arbitration tribunal duly constituted under the terms of a contract or agreement binding upon both parties. In my opinion the plaintiff firm was not entitled to claim the benefit of the arbitration clause (No. 15 of the contract) unless and until the provisions of the previous clause had been complied with. If this view is correct, it follows that the award of the umpire is not the decision of a tribunal to which the defendant firm was bound, under the terms of their contract, to submit.

I would therefore dismiss this application with costs.

WALSH, J.:—I agree that the applicants in this case are not entitled to an order filing the award. In my judgment the arbitrator and umpire had no jurisdiction, on the ground of the failure by the sellers to comply with clause 14 of the contract. The interpretation generally of clauses is for the arbitrators. But there is no question of interpretation in this case. To hold that a plain and unambiguous clause applies against one party to the contract and not against the other is misconduct. In this case it is clear that it was so held in the interests of a class to which the arbitrator himself belonged. An arbitrator cannot give himself jurisdiction by arriving at a conclusion which there is no evidence to support, and on the evidence it was plain that no claim in writing was made within the sixty days, nor was there any evidence that this stipulation had been waived.

Application dismissed.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

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March, 16.

GOBARDHAN SINGH AND OTHERS (PLAINTIFFS) *v.* RAM BADAN SINGH (DEFENDANT).*

Suit for damages for malicious prosecution—Burden of proof—Production of judgment of criminal court not by itself sufficient to prove falsity of the accusation.

In an action for malicious prosecution it is not sufficient, in order to prove the falsity of the accusation, for the plaintiff to put in the judgment of the criminal court which terminated in his acquittal. *Abrath* v. *The North-Eastern Railway Company* (1)referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *M. L. Agarwala*, for the appellants.

Babu *Harendra Krishna Mukerji* and Dr. *Kailas Nath Katju*, for the respondent.

LINDSAY and STUART, JJ.:—This appeal is against a decree of the learned District Judge of Benares upholding a decree of the Additional Subordinate Judge dismissing a suit for damages for malicious prosecution. The defendant respondent made a report at a police station to the effect that certain persons had committed a riot and had assaulted him, being directed to do so by the plaintiffs appellants. The Additional Subordinate Judge found that the witnesses for the plaintiffs, who deposed that no such riot as that described in the report had been committed, were not worthy of credit. He found that the witnesses for the defendant who deposed that such riot had taken place were worthy of credit and he dismissed the suit for damages for malicious prosecution on the clear finding that the complaint made by the defendant was in fact true. He took a completely different view to the view taken by the criminal court which had found that the complaint was not substantiated

The learned District Judge would have been better advised to have confined himself to the point to which the Additional Subordinate Judge had directed his attention. The view that he took must, however, be supported. It is as follows:—

He decided that inasmuch as the evidence produced by the appellants was unworthy of belief their suit could not succeed.

* Second Appeal No. 198 of 1920, from a decree of O. F. Jenkins, District Judge of Benares, dated the 11th of November, 1919, confirming a decree of P. K. Ray, Additional Subordinate Judge of Benares, dated the 7th of April, 1919.

(1) (1883) L. R., 11 Q. B. D., 440 (455).

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They set out to prove a specific case that nothing of any kind had happened as alleged in the plaint. They undoubtedly are found by the learned District Judge to have failed to prove that case.

In appeal it has been argued that all that the appellants had to do for the purpose of proving the falsity of the accusation was to put in the judgment of the criminal court which terminated in their acquittal. We do not, however, accept this view. In the words of BOWEN, L. J., in *Abrath* v. *The North-Eastern Railway Company* (1), "In an action for malicious prosecution the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made.".

In any circumstances, we cannot disturb the finding of the learned District Judge. We accept his view that in the circumstances of this particular case the plaintiffs had failed to surmount their first obstacle inasmuch as the evidence which they produced in support of their case was unworthy of belief and did not establish their innocence. We would, therefore, dismiss this appeal with costs.

Appeal dismissed.

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March, 17.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

HAR PRASAD TIWARI (PLAINTIFF) v. SHEO GOBIND TIWARI (DEFENDANT).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 20—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 24—*Occupancy holding—Mortgage—Suit on personal covenant to pay.*

The mortgage of an occupancy holding being void in its entirety, it is not open to the mortgagee to sue for a money decree on the basis of a personal covenant to pay contained in such a mortgage. *Kanhai* v. *Tilak* (2), *Murlidhar* v. *Pem Raj* (3) and *Bhawani Prasad* v. *Ghulam Muhammad* (4), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

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* Second Appeal No. 823 of 1920, from a decree of Abdul Hasan, Subordinate Judge of Jaunpur, dated the 2nd of March, 1920, confirming a decree of Nand Lal Singh, Munsif of Jaunpur, dated the 7th of December, 1918.

(1) (1888) L. R., 11 Q. B. R., 440 (455). (3) (1899) I. L. R., 22 All., 205.

(2) (1912) 16 Indian Cases, 42. (4) (1895) I. L. R., 18 All., 191.

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HAR PRASAD TIWARI v. SHEO GOBIND TIWARI.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Hariharnath Sahai*, for the respondent.

LINDSAY and STUART, JJ.:—We have heard the learned counsel for the appellant in this case and we think the appeal ought to fail. The facts are that the defendant respondent, Sheo Gobind Tiwari, made three mortgages of property in favour of the plaintiff on successive dates. These mortgages were usufructuary mortgages, and in the case of the first two the property mortgaged was admittedly portions of an occupancy holding. In the third mortgage the property consisted partly of fixed-rate tenancy and partly of occupancy holding. It appears that after these mortgages were executed, two-thirds of the mortgaged property was lost to the mortgagee owing to its being discovered that the mortgagor had a right in these properties only to the extent of one-third. Having thus been deprived of a portion of the mortgage security, this suit was brought by the plaintiff, purporting to be a suit under section 68 of the Transfer of Property Act. The plaintiff asked for a simple money decree. Both courts have refused to give him one, on the ground that the mortgage contracts were void, being forbidden by the provisions of the Agra Tenancy Act. It has been argued before us that, inasmuch as there was a personal covenant in each of these mortgages the plaintiff was entitled to resort to those covenants and to ask at least for a simple money decree. It seems that when these mortgage-deeds were executed, a covenant was entered into by the mortgagor on behalf of himself and his successors in interest, whereby he undertook to pay interest at the rate of 2 per cent. per mensem on the principal sum in case the mortgagee lost possession owing to any default on the part of the mortgagor. We may mention here that the arrangement was that the mortgagee was to be in possession under these mortgages in lieu of interest.

It appears to us that the decision of the courts below ought to be upheld, and we have an authority directly in point in this case in a decision of Mr. Justice CHAMIER which is reported at page 42 of volume XVI of the *Indian Cases*, (*Kanhai* v. *Tilak*). That case purports to follow the decision of a Full Bench in *Murlidhar* v. *Pem Raj* (1). That Full Bench ruling in turn

(1) (1899) I. L. R., 22 All., 205.

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followed the ruling of a Division Bench in *Bhawani Prasad* v. *Ghulam Muhammad* (1). It is true that both these latter cases related to transactions of sale. Those were cases in which the vendee sought to get back the purchase money from his vendor when it was found that possession could not be obtained inasmuch as the transaction involved the transfer of *sir* land and the relinquishment of ex-proprietary rights. We agree with the view taken by Mr. Justice CHAMIER in the case above-mentioned that to enforce an agreement of this kind would be contrary to the provisions of section 24 of the Contract Act. Under that section the entire contract is deemed to be void, and that being so, the personal covenants upon which the plaintiff relies in this case and which are embodied in these three mortgage bonds, must fall along with the contract of mortgage. The decision of the court below must be upheld. The appeal fails and is dismissed with costs.

Appeal dismissed.

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March, 17

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KARAMAT ALI AND ANOTHER (DEFENDANTS) v. THE GORAKHPUR BANK, LIMITED (PLAINTIFF).*

Mortgage—Contribution—Liability of auction purchaser of part of mortgaged property.

Certain property which was subject to a mortgage was sold in execution of a simple money decree and was purchased by three separate purchasers in equal shares. Purchaser No. 2 then mortgaged his share to a Bank, which brought a suit on its mortgage and having obtained a decree, became the purchaser of that one-third share. The original mortgagees then brought a suit for sale on their mortgage. As to purchaser No. 1, they agreed to release his share on payment of Rs. 1,333-5-4 and also agreed to compensate him for any additional amount which he might be made to pay on account of the decree. As to purchaser No. 3, his share was sold by auction and realized Rs. 4,200. As to the Bank, its share was also sold by auction and realized Rs. 10,000 and the decree was satisfied. The Bank then sued purchasers Nos. 1 and 3 and the mortgagees for contribution.

Held that the plaintiff had no claim either as against the mortgagees or as against purchaser No. 3, but only as against purchaser No. 1 in whose case the suit had been dismissed and plaintiff had not appealed. *Shanto Chandar*

* First Appeal No 403 of 1919, from a decree of Gobind Prasad, Subordinate Judge of Azamgarh, dated the 19th of September, 1919.

(1) (1895) I. L. R., 18 All., 121.

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Maharji v. *Nain Sukh* (1), distinguished. *Hari Raj Singh* v. *Ahmad-ud-din Khan* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr *B. E. O'Conor* and Maulvi *Iqbal Ahmad*, for the appellants.

Mr. *G. W. Dillon*, for the respondent.

MEARS, C. J., and BANERJI, J. :—The facts of this case are these. On the 15th of June, 1888, one Hasnu mortgaged a three anna share to the defendants 3 and 4. The mortgaged property was sold in execution of a simple money decree, and a one anna share was purchased by one Kali Charan, who was the predecessor in title of the defendants 1 and 2. Another one anna share was purchased by Sarju Prasad, and the third one anna share was purchased by Wazir Ali, the defendant No. 5. Sarju Prasad mortgaged the one anna share purchased by him to the Gorakhpur Bank. The Bank obtained a decree upon that mortgage and caused the one anna share to be sold by auction, and it became the purchaser of that share. The defendants 3 and 4, the mortgagees under the mortgage of 1888, brought a suit on the basis of that mortgage against the defendants 1 and 2, the Gorakhpur Bank and Wazir Ali, the defendant No. 5, and obtained a decree for sale. In the suit in which that decree was passed a compromise was entered into between the mortgagees and the defendants Nos. 1 and 2, by which the latter agreed to pay to the mortgagees Rs. 1,333-5-4 and the mortgagees undertook to release from liability the one anna share purchased by their father, Kali Charan. The aforesaid amount appears to have been paid to the decree-holders and a sum of Rs. 14,200 was the balance outstanding under the decree. The decree-holders caused the one anna share of Wazir Ali to be sold by auction, and this sale realized Rs. 4,200. They then put up to sale the one anna share purchased by the Gorakhpur Bank, and this sale realized Rs. 10,000, which fully discharged the decree. After this auction sale the present suit was instituted by the Gorakhpur Bank against the defendants 1 and 2, the defendants 3 and 4 and Wazir Ali, the fifth defendant. The Bank's contention was that the one anna share, of which it was the purchaser, was liable for one-third

(1) (1901) I. L. R., 23 All., 355. (2) (1897) I. L. R., 19 All., 545.

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of the mortgage debt, that it had contributed more than its rateable share, and that the Bank was, therefore, entitled to be recouped the amount which the sale of its property had fetched in excess of its share of liability, and on this ground the Bank claimed Rs. 4,822-3-7 and interest. The court below dismissed the claim as against the defendants 1 and 2; it also dismissed the claim against Wazir Ali; but it made a decree against the defendants Nos. 3 and 4, the decree-holders, on the ground that under the compromise between them and the heirs of Kali Charan they had undertaken to compensate the heirs of Kali Charan for any amount which they might have to pay on account of the decree in addition to the amount which they had undertaken to pay. The decree-holders, the defendants nos. 3 and 4, have preferred this appeal, and it is contended on their behalf that if the claim could be maintained against any one, it could be maintained against defendants 1 and 2 and the decree of the court below as against them (defendants 3 and 4) was an erroneous decree. We may mention that the Gorakhpur Bank did not prefer any appeal against that part of the decree of the court below which dismissed the claim against Wazir Ali and against the defendants 1 and 2. In our opinion the decree of the court below as regards Wazir Ali is correct. No doubt the one anna share which Wazir Ali purchased was rateably liable for one-third of the mortgage debt; but Wazir Ali surrendered that share and it was sold by auction. Therefore no claim for contribution could be brought forward against him. He was not in possession of any part of the mortgaged property after the auction sale of his one anna share, and no claim could be advanced against him as no personal liability was incurred by him. The only persons against whom the Gorakhpur Bank, which undoubtedly had contributed more than its rateable share of liability, could maintain its claim, were the defendants 1 and 2, whose share in the mortgaged property has not yet been sold, but the court below exempted those defendants from the claim on the groundthat the decree-holders, defendants 3 and 4, had undertaken by the compromise to pay up any amount for which the defendants 1 and 2 might be liable. This part of the judgment of the learned Subordinate Judge is, in our opinion, erroneous. There was no privity of contract between the plain-

tiff (*i. e.* the Gorakhpur Bank) and the decree-holders, defendants 3 and 4, and, therefore, by virtue of the compromise the Gorakhpur Bank could have no claim as against the defendants Nos. 3 and 4. The right of the Gorakhpur Bank to obtain contribution from the defendants 1 and 2 could not be deemed to attach to the decree-holders, defendants 3 and 4, by reason of their agreement with the defendants 1 and 2 to release their one anna share from liability for the mortgage. It was, however, contended by Mr *Dillon* on behalf of the Bank that the defendants 3 and 4, being auction purchasers of the one anna share of the Gorakhpur Bank, were liable to the Bank to make good the amount which the Bank had to pay in excess of its share of liability. In our opinion the position of the defendants 3 and 4 was that of auction purchasers of the one anna share of the Gorakhpur Bank. As such auction purchasers, they could not be held liable to contribute towards the mortgage money. An auction purchaser in execution of a decree obtained upon a mortgage purchases the rights of the mortgagor and the mortgagee at the date on which the mortgage was made and any subsequent equities or liabilities which arose in respect of the mortgaged property could not attach to him inasmuch as he acquired the property free from any such liabilities or equities. Mr. *Dillon* has failed to draw our attention to any authority in which it has been held that a claim like the present could be brought against the auction purchaser. He referred to the case of *Sarato Chandar Mukerji* v. *Nain Sukh* (1), but that was not a case like the present and the circumstances of that case are wholly distinguishable from those of this case. The case which is applicable to the appeal before us is that of *Hari Raj Singh* v. *Ahmad-ud-din Khan* (2). In that case it was held that a suit for contribution could be brought only against the holder of the portion of the mortgaged property which had remained unsold. In this view the decree of the court below cannot be supported, and this appeal must prevail. We accordingly allow the appeal, set aside the decree of the lower court and dismiss the suit with costs.

Appeal allowed.

(1) (1901) I. L. R., 23 All., 355. (2) (1897) I. L. R., 19 All., 345.

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KULSUM-UN-NISSA v. RAM PRASAD.

Piggot, J.

2 Whether the defendant is the tenant of the plaintiff, and is the plaintiff entitled to get rent and interest?

3. Whether the suit is barred by section 106 of the Transfer of Property Act?

4. Whether the defendant has acquired adverse possession? Who built the house in dispute?

5. Whether the suit is barred by limitation?

The plaintiff filed the original lease and a number of counterfoils and receipts of payment of rent. She also examined some five witnesses. The defendant summoned five witnesses, examined three of them and exempted the remaining two. The learned Munsif, in a short but clear enough judgment, came to the conclusion at which he arrived and decreed the suit. The defendant appealed. According to his memorandum of appeal, he contested the findings of fact come to by the trial court. He pleaded that the evidence given on his behalf established his own defence. Nowhere was it suggested that the court had not given him full opportunity of proving his case, or that it excluded any evidence which he wished to produce. The learned Judge has not tried the appeal himself, that is to say, he has come to no conclusion on any single issue raised in the case. He says:—"I think the issues do not clearly cover all the points raised." He objects to the learned Munsif having tried the issues together. He says:—"I think there ought to be a clear and separate finding on each and every issue raised as required by law. I would set aside the decree, frame the following issues and send the case back for decision of each and every issue separately on the evidence on the record as well as on such other evidence which the parties may deem proper to adduce, and for which an opportunity will be given to them." He then framed five issues. From this order of remand the plaintiff comes in appeal. On behalf of the respondent it is argued strenuously that no appeal lies. It is contended that this order of remand must be taken to have been made under section 107 read with section 99 of the Code of Civil Procedure and that under section 104, clause (1), an order under these sections is not appealable under order XLIII. The learned Judge, in making his remand, does not say under what

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2. Whether the defendant is the tenant of the plaintiff, and is the plaintiff entitled to get rent and interest?

3. Whether the suit is barred by section 108 of the Transfer of Property Act?

4. Whether the defendant has acquired adverse possession? Who built the house in dispute?

5. Whether the suit is barred by limitation?

Eyre, J.

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Bytes, J.

section he is passing his order. The point was considered recently by a Division Bench of this Court in the case of *Gokul Prasad Har Prasad* v. *Ram Kumar* (1) and I think that the observations of Mr. Justice PIGGOTT from the bottom of page 975 to the top of page 976 should be followed. He says there: "I do not think there is any reason to hold that the learned Judge in this case thought he was exercising any inherent jurisdiction outside that given to him under order XLI." I think that in fact the Judge thought he was acting under order XLI, rule 23. As I have said before, he does not decide any single issue in the appeal. He has come to the conclusion that the first court had jumbled up the issues and apparently misconceived the real defence and has in fact misdirected itself *in limine* and that, therefore, there has never been any real trial of the case as the pleadings required. It seems to me this really is a finding on a preliminary point within the meaning of order XLI, rule 23. In my opinion, therefore, an appeal does lie. On the merits, it seems to me that the learned Judge should have tried the appeal, that the issues raised by the Munsif adequately represented the pleadings of the parties, that no other issues were necessary for the trial of the case. As both parties had had full opportunity and had availed themselves of that opportunity of producing all the evidence that they wished, further evidence should not have been admitted. In my opinion the order of the Judge remanding the case was wrong. I would set it aside and direct that the appeal be restored to its original number and disposed of according to law.

WALSH, J.:—I only wish to add this. With regard to the right of appeal, I was a party to the case referred to by my brother and I agree that this case is analogous. In my view, in the case of an order of remand, it must be presumed, unless the contrary is shown at the time when it is made, to be made under order XLI, rule 23. The litigant has to make up his mind whether he has a right of appeal, and, if so, what, and if he finds an order against him of remand that he objects to, like the order before us, and there is nothing to the contrary, the only inference that he can draw is that it is made under the statutory provisions contained in order XLI, rule 23. An order

(1) (1921) I. L. R., 44 All., 176.

may be made under that section and yet be wrongly made, but it would nonetheless be appealable, and personally I am not prepared to adopt the view that once an appeal has been filed and admitted in this Court as an appeal against an order of remand under that provision and notice has gone, the respondent can improve his position by satisfying the Court that the order complained of is so bad or so unintelligible that it is impossible to bring it under any provision and, therefore, it is not appealable at all. I think that this is the substantial answer to what Mr. *Panna Lal* calls his preliminary objection. It is not a preliminary objection. The order was *primâ facie* appealable as a remand order. It does not make it less appealable to say that the order is an indefensible one. Costs must abide the result of the suit.

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Appeal allowed.

PRIVY COUNCIL.

RAM GOPAL LAL (DEFENDANT) v. AIPNA KUNWAR (PLAINTIFF)

[On appeal from the High Court at Allahabad]

*P.C.**
1923
June, 30.

Will—Proof of execution—Evidence—Attesting witnesses.

Upon an issue whether the signature to a will is genuine or a forgery, the best evidence procurable of signature of the document by the testator should be furnished, an attempt to support the signature by anything which falls short of that standard, though it may not be fatal, is a serious defect. The absence of any of the attesting witnesses who are not called should be satisfactorily accounted for. Evidence to the effect that the signature appears to be genuine is of little worth in the absence of reliable evidence by witnesses present when the will was signed.

Judgment of the High Court reversed.

APPEAL (No. 55 of 1921) from a judgment and decree of the High Court (28th April, 1919,) reversing a decree of the District Judge of Azamgarh.

The present appeal arose out of an application made by the respondent for a grant of probate of a document, dated the 25th of January, 1915, purporting to be the will of her deceased husband, Bijai Singh. The appellant, a reversioner in the event of an intestacy, pleaded that the document had not been executed by the deceased but was a forgery.

*Present:—Lord BUCKMASTER, Lord ATKINSON, Lord STUMEL, Lord CARSON and Sir JOHN EDGE

of evidence bearing upon the present dispute is that of a man called Rameshar Prasad, who is head master of a school at Hardoi. He stated that at a date which the High Court fixed at the end of December, 1914 though the witness himself does not specify the exact time, he was informed orally by a man named Babu Manohar Lal, who was not called as a witness, that Babu Bijai Singh wanted to start a school to teach English, Hindi and mathematics, and asked witness to prepare a scheme. This he did, and sent it to the deceased, who appears to have acknowledged it, but nothing further took place. The bearing of this evidence upon the dispute is due to the fact that the document under consideration expresses a desire to establish such a school and makes provision for its expenses; but this amounts to no more than that a portion of the will complied with what appears to have been a former wish of the deceased, a wish which may well have been known to the people who put forward the document. There is no further evidence at all with regard to the matter until the date when the will was prepared and purports to have been executed. The drawing up of the document was undoubtedly done by one Ram Ratan Lal, and his evidence is that it was prepared on the 25th of January. It is stated, however, that it was executed on the following day—the 26th—and it purports to bear the signature of the deceased affixed in the presence of seven witnesses. It is a will of substantial length. It contains no reference whatever to the male agnatic relations of the deceased, but begins by a eulogy of his sister's sons. It then provides that a 12 annas share in mauza Khairauti, yielding Rs. 500 a year after payment of the Government Revenue, should be dedicated "for meeting the religious expenses incurred in connection with Bari Sanghat situate at Nizamabad, Durbar of Sri Harmandirji situate in the city of Patna, and Bari Sanghat Risham Katra situate in the city of Benares, and the temple at Nizamabad which has been built by my paternal grandmother." The next provision is for the expenses of a school where education is to be given in English, in the vernacular of the Province, and in the Gurmukhi, by dedicating to this object a mauza yielding a profit of Rs 1,200 a year. It then declares that the rest of the property should

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remain in the possession of the widow, with a direction that she should keep any of the nephews—meaning no doubt, those already named—on whom she relies to look after her and the property—and give him one-fourth of the property for his services, the remaining property after her death to be divided equally among the other three nephews, and it concludes with a very specific and detailed account of fifteen items of property. Ram Ratan Lal alleges that no draft was ever made of this will, but that it was dictated to him by the deceased, at one interview beginning at four o'clock on the 25th of January, in the presence of Kali Charan and Jageshar, whose names appear as witnesses. There is no erasure or alteration of any kind from beginning to end of the whole document. This is in itself a remarkable fact—that a man stricken with illness, as the deceased was, should have been able to dictate in clear, logical, and even legal form, a complete and consecutive account of all his wishes, divided into separate paragraphs, including a specific enumeration of his whole estate, without one single error from beginning to end is a matter which arrests attention and provokes comment. The proceedings that follow show, in their Lordships' mind, quite clearly that that comment is only too well justified.

According to the respondent's case, there was no manner of concealment about the will. It was executed on the morning of the 26th of January, in the presence of many people, and attested by seven. It would, therefore, appear there was every reason why, upon the death of Babu Bijai Singh, the will would have been found and instantly put forward for probate; but no such proceeding took place. The first step that was taken was an application for the mutation of names with regard to the real estate made on behalf of the widow by Baj Bahadur Singh, who appears throughout as the representative of the widow and who, if the disputed document were genuine, would doubtless be the selected nephew who took one-third of the estate. He asked on her behalf that the property should be changed from the name of the deceased to that of his widow who claimed by inheritance, and he signed the patwari's report, dated the 22nd of March, 1915, which stated that the nature of the transfer

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was inheritance. To this objection was taken on behalf of the male agnatic relations, who alleged that there was an oral will, and upon this dispute witnesses were examined. The first witness, who was a grandson of the deceased, supported the widow's application, and said that Babu Bijai Singh died intestate, and that he would have expected to have known had a will been made. So also did another grandson named Hanuman Prasad. Ram Ratan Lal was not a witness, but he was aware of the mutation proceedings and made no reference to the will; and it was only on the 7th of May, when Raj Bahadur Singh was examined, that the will was, for the first time, mentioned. He then states in cross-examination that the deceased had made a written will, and bequeathed the whole of the property to his widow. His evidence as then given is as follows:—

"The Musammat has a right on account of her being the widow of the deceased. Babu Bijai Singh has also bequeathed the whole of his property to Musammat Apna Kunwar under a will (*vasiyat bhi kar daya hai*"). I do not know if (this fact) is known to witnesses. The will is a written one. It has not been produced. It is not here. It is with the Musammat. The will was executed in January last. It was executed at Nizamabad, at the house of Bijai Singh. I do not know exactly as to who were present there. I say everything from hearsay. I have been told this by the Musammat. I was not present (at the time of execution of the will). I have had a cursory view of the will. I do not know as to who the scribe is; nor do I know the names of the witnesses."

If the will was, in fact, in existence at this date, and had been seen by Raj Bahadur Singh, it is certainly a most extraordinary fact that he never mentioned it until the hearing; and that then, having seen it (though, as he says, only cursorily), he asserted that it conveyed the whole of the property to the widow when in truth he was an important beneficiary under its terms.

The will was not produced in court, and the mutation proceedings ended by mutation being granted to the widow, on the ground of inheritance. An appeal was taken unsuccessfully to the Commissioner and the Board of Revenue, but still the will was not forthcoming.

On the 13th of September, 1915, the will is for the first time introduced to public notice, on the application then made by Raj Bahadur Singh on behalf of the widow for its admission to probate.

up for hearing, he wrote a letter in which he sought the good offices of Munshi Dihari Lal, who was one of the officials in the Board of Revenue, in favour of Baj Bahadur Singh, whom he described as his near friend and patron. The explanation that he gave of these letters is stated by the learned District Judge to be a gross absurdity, and with that criticism their Lordships agree. Although the learned District Judge who tried the case did not say in so many words that he disbelieved Ram Ratan Lal, his judgment can, of course, only have proceeded on the fact that he believed him to be lying, and their Lordships see no reason to differ with this conclusion.

The remaining evidence consists of the two witnesses that have been mentioned, and their introduction into the story is certainly remarkable. Nobody knew they were coming, and they had no reason whatever to give of their presence, except that Baba Makund Singh said he had been asked by a letter not produced and by a man since dead to go to the deceased who wished to consult him about a "waqf." This was twenty or twenty-five days before the 25th of January. They were due at Benares on the 25th of January, 1915, but they were occupied in court that day, and it was, therefore, impossible to put them forward for witnesses of a will executed on the 25th. They say that they attended on the morning of the 26th. They state that they arrived early; they waited in a room facing a verandah with other people and affixed their signatures. Baba Makund Singh says that some of the other people there present also affixed their signatures. Parmeshar Singh says no one affixed a signature in his presence except Baba Makund Singh; he adds, however, that Ram Ratan Lal read out the will, but this is not corroborated by Baba Makund Singh, who says the deceased read it, and makes no mention of its being read out by anybody.

The learned Judge who saw them said that he is quite satisfied that these men never were at Bijai Singh's house at all—in other words, he thinks they were telling untruths; and if their evidence is not to be trusted, there was no evidence at all before the court on which reliance could be placed to prove the execution of the will. Finally, Baj Bahadur Singh is called; and he gives evidence totally different from that given by him

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on the mutation proceedings. He asserts that the deceased told him all the conditions of the will; that shortly after the death, the widow showed him the will and he read it all through and saw the names of the witnesses, and took the will from her on the day of his examination in the mutation proceedings. His explanation is that the earlier evidence was wrongly transcribed by putting the widow's name in place of the deceased's as his informant. But comparison of the two statements shows that this explanation is useless as a reason for the discrepancy. This concludes the evidence for the respondent, and the District Judge rejected it. The High Court in differing from his judgment based their opinion, first, on the statement with regard to the proposed establishment of a scheme for a school; and, secondly, on the fact that the applicant widow who put forward the will was injured by its provisions.

Those considerations lead but a little way towards determining whether the signature was or was not the signature of the dead man; the point about the scheme has been already mentioned, while, so far as the widow's position is concerned, it should be remembered that the whole of the proceedings have been taken on her behalf by Baj Bahadur, who is a beneficiary under the alleged will, and she has never at any stage of any of the proceedings been personally introduced into the matter. Although Ram Ratan Lal is not regarded by the High Court as a person of character, and his statements are said by them not to be probable, they appear to accept the fact of his oath as to the execution in the face of the disbelief of the Judge who saw the witness. They regard Makund Singh's evidence as trustworthy, and think that the learned Judge disbelieved it on the ground that there was a personal motive involved. That may have influenced the learned Judge, but he was also influenced by the fact that in other proceedings Makund Singh had been guilty of falsehood, and by the inherent improbability of the whole of his story, which does not appear to have been sufficiently weighed and considered by the High Court.

The only remaining fact is—and this has caused their Lordships some uneasiness—that the learned Judges of the High Court, one of whom has a knowledge of native writing which

their Lordships do not possess, regard the signature as good, having compared it with the undoubted specimens of the testator's writing. The answer to this, however, is that no forgery is of the least value, unless it closely resembles the real signature; and when witnesses are available to prove that a man actually made a signature, any evidence of a general nature to the effect that the signature appears to be genuine is of little worth in the absence of the material witnesses. Finally, their Lordships are greatly impressed with this fact—that no evidence whatever has been forthcoming to show when this document was found, where it was found, by whom it was found, or why it was that it was kept back until after the claim by the male agnatic relations was made, and the widow's evidence has never been taken nor any explanation offered of her absence. The history of a document such as this is of the most material importance for the purpose of determining its validity, and in the present case this history is a complete blank.

Their Lordships are of opinion that there has been no trustworthy evidence to establish the alleged signature of Babu Bijai Singh. There has been no adequate explanation of why the witnesses were not called who could have proved it, and they are forced to the conclusion that the document is not genuine and that this appeal should be allowed with costs and the judgment of the District Judge restored. They will humbly advise His Majesty accordingly. *Appeal allowed.*

Solicitor for appellant:—*Edward Dalgado.*

SARDAR SINGH AND OTHERS (PLAINTIFFS) *v.* KUNJ BIHARI LAL AND OTHERS (DEFENDANTS).

*P.C.** 1922 *June*, 30.

[On appeal from the High Court at Allahabad.]

Hindu law—Hindu widow—Alienation of property of deceased husband—Small fraction alienated—Spiritual benefit of husband.

A Hindu widow in possession of the estate of her deceased husband made a gift by deed of immovable property forming about one-seventy-fifth of the whole estate for the observance of *bhog* (food offerings) to a deity, and for the maintenance of the priests. The gift, which was made in performance of a vow taken upon a pilgrimage to the temple, was stated by the deed to be for the salvation of the deceased husband, his family, and the widow. The

**Present*:—Lord PHILLIMORE, Lord CARSON, Sir JOHN EDGE and Mr. AMEER ALI.

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widow had sufficient income to provide for the observances without an alienation of part of the estate.

Held that the alienation was valid, since the property given formed only a small fraction of the whole estate, and the gift was for the continuous spiritual benefit of the deceased husband, though not for an observance essential to his salvation according to Hindu religious law.

Observations in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2) followed.

Rama v. *Ranga* (3), *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (4) and *Khub Lal Singh* v. *Ajodhya Misser* (5) approved.

Ram Kawal Singh v. *Bam Kishore Das* (6) distinguished.

Judgment of the High Court (I. L. R., 41 All., 180) affirmed.

APPEAL (No. 58 of 1921) from a judgment and decree of the High Court (6th of June, 1918,) reversing a decree of the Subordinate Judge of Moradabad (23rd of August, 1915).

The suit was brought by Laltu Singh, the predecessor of the present appellants, to recover possession of certain immovable property which formed part of the estate of Raja Gur Sahai, deceased, whose reversionary heir the plaintiff claimed to be. In 1876 the Raja's widow, while in possession of his estate, had made a gift of the property in suit to the temple of Jagannath at Puri, by a deed which is set out in the judgment of the Judicial Committee. The gift was made in performance of a vow made by the widow on a pilgrimage to Puri, and was for *bhog* (food offerings) to the deity, and the maintenance of the priests in charge. It was found that the property represented about one-seventy-fifth of the whole estate, which produced an income of Rs. 60,000 per annum. The temple authorities had sold the land to the first respondent; the second respondent (defendant) was a lessee from him.

The Subordinate Judge made a decree for possession and mesne profits. He bases his judgment on the view that the purpose of the gift was not the performance of any religious duty which was essential, and that the donor had sufficient income out of which to make the gift.

On appeal to the High Court the learned Judges (PIGGOTT and WALSH, JJ.) after a consideration of the authorities, reversed the

(1) (1861) 8 Moo. I. A., 529. (4) (1910) I. L. R., 34 Mad., 238.

(2) (1869) 13 Moo. I. A., 209. (5) (1915) I. L. R., 43 Calc., 574.

(3) (1885) I. L. R., 8 Mad., 552. (6) (1895) I. L. R., 22 Calc., 506.

decision, and dismissed the suit. The appeal is reported at I. L. R., 41 All., 130.

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1922, May 11 12. De Gruyther, K. C., and *Dube*, for the appellants.

The alienation was invalid. The property in the possession of the Rani produced a large income, amply sufficient to provide for the observances referred to in the deed of gift. That being so, she was not entitled to alienate any part of the corpus of the property, even if the observances had been of an indispensable character. The observances here provided for, though proper, were not essential for the deceased husband. Further, by the deed they purported to be for the benefit of the family of the deceased and the widow herself, as well as for the benefit of the deceased. A general review of the authorities shows that the decision of the Subordinate Judge was right in substance. So far as the cases lay down a general rule, they do not exclude the view that necessity to alienate must be proved; any of the cases which appear to do so are not supported by the general body of authority. (Reference was made to the following cases, here given in order of date: *Cossinaut Byssack* v. *Hurrosoondry Dossee* (1), *Ram Chunder Surma* v. *Gunjayonni* (2), *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (3), *Kartick Chunder Chuckerbutty* v. *Gour Mohun Roy* (4), *Huro Mohun Audhikaree* v *Aulak Monee Dassee* (5), *Raj Chunder Deb Biswas* v. *Sheeshoo Ram Deb* (6), *Raj Lukhee Dabea* v. *Gokool Chunder Choudhri* (7), *Mahomed Ashruf* v. *Brijessuree Dassee* (8), *Muteeram Kowar* v. *Gopul Sahoo* (9), *Runjeet Ram Koolal* v *Mahomed Waris* (10), *Puran Dai* v. *Jai Narain* (11), *Rama* v. *Ranga* (12), *Lakshminarayana* v. *Basu* (13), *Ram Kawal Singh* v. *Ram Kishore Das* (14) *Churuman Sahu* v. *Gopi Sahu* (15), *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (16),

(1) (1819) 2 Morley's Digest, 193.
(2) (1826) 4 Mac Sel. Rep., 147
(3) (1861) 8 Moo. I. A., 529.
(4) (1864) 1 W. R., C. R., 48.
(5) (1864) 1 W. R., C. R., 232.
(6) (1867) 7 W. R., C. R., 146.
(7) (1869) 13 Moo. I. A., 209.
(8) (1873) 19 W. R., C. R., 425.
(9) (1873) 20 W. R., C. R., 137.
(10) (1873) 21 W. R., C. R., 49.
(11) (1883) I. L. R., 4 All., 482.
(12) (1885) I. L. R., 8 Mad., 552.
(13) (1887) I. L. R., 11 Mad., 288.
(14) (1895) I. L. R., 22 Calc., 506.
(15) (1903) I. L. R., 37 Calc., 1.
(16) (1910) I. L. R., 34 Mad., 989.

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Khub Lal Singh v. *Ajodhya Misser* (1); also to MacNaghten's Hindu Law 1874 edn.) p. 211 and Sarkar's Vyavastha Chandrika, Vol. 1, paras. 105, 106.)

Sir George Lowndes, K. C., and *Kenworthy Brown*, for the first respondent.—

The amount of the gift being small in relation to the whole property, the alienation was valid. Gifts of this character by a widow on making a pilgrimage are usual observances for the spiritual benefit of the husband. Gifts to temple Brahmins are recognized as proper throughout Manu, see Manu, ch. 11, v. 6 and ch. 7, v. 85. A Hindu widow has absolute discretion over the income of the property vested in her; there is no authority for the contention that she must exhaust the income before she can alienate any part of the corpus for spiritual purposes. The result of the authorities upon the general question was correctly stated by the High Courts in *Vuppuluri Tatayya* v. *Garimilla Ramakrishnamma* (2) and *Khub Lal Singh* v. *Ajodhya Misser* (1). In the century covered by the decisions referred to, the passage in the judgment in *Mahomed Ashruf* v. *Brijessuree Dasee* (3) alone supports the view that the widow could not for the purpose alienate any part of the corpus unless the income was insufficient. (They were stopped).

The other respondents did not appear.

June 30.—The judgment of their Lordships was delivered by Mr. AMEER ALI.

This is an appeal from a judgment and decree of the High Court at Allahabad, dated the 6th of June, 1918, and arises out of a suit brought by the plaintiff Lalta Singh, since deceased, in the court of the Subordinate Judge of Moradabad on the 13th of September, 1913. The object of the suit was to set aside an alienation purporting to have been made for a religious or pious purpose by a Hindu lady of the name of Rani Kishori on the 8th of January, 1876. The point involved in the determination of the appeal relates to the powers of a Hindu female on whom property devolves upon the death of the husband, son or father, as a limited estate, to alienate any part of the property for religious purposes. Rani Kishori was the widow of Raja

(1) (1915) I. L. R., 43 Calc., 574. (2) (1910) I. L. R., 34 Mad., 288.
(3) (1873) 19 W. R., C. R., 426, 427.

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Gur Sahai, who died in 1865 and was at the time of his death possessed of a considerable estate, yielding an annual income of some Rs. 60,000. He left two minor sons, both of whom died in infancy in 1873, five years after the death of their father. The property then devolved on Rani Kishori in succession to her sons. The Rani died on the 10th of August, 1907, when succession opened to the reversioners of Raja Gur Sahai. There was some litigation as to the right of reversion, which was finally adjudged in favour of Lekh Singh, the plaintiff, and he, as stated before, brought the suit on the 13th of September, 1913, to set aside the alienation referred to above. It appears, upon the evidence, that after the death of her sons the widowed mother, according to the custom of pious Hindus, especially females, made pilgrimages to different sacred cities, among them Benares, Gaya and Puri. She appears to have visited Puri in the year 1875, and there made a *sankalpa* or vow to create a dedication for the observance of *bhog* or food offerings to the presiding deity, and for the maintenance of the priests (pandas) who were charged with the performance of that duty. In 1876 she gave effect to her *sankalpa* by executing, as it is alleged on behalf of the defendants, a document purporting to be a gift for the purpose referred to.

That document, so far as is material for the purposes of this judgment, is in the following terms :—

"I, Mussammat Rani Kishori Kunwar, widow of Raja Gur Sahai, deceased, by caste a Jat, 'rais' and resident of Moradabad, do declare as follows :—

Whereas I, according to the custom prevailing among the Hindus, happened to go on a pilgrimage to Prayagji and Kashiji and on a visit to Jagannath in 1282 Fasli and at the time of paying a visit to, and performing the worship of, Jagannathji Maharaj, made a charitable gift and 'shankalp' of a moiety of a 'pakka' built house facing the east in mahalla Sambhal Darwaza in Moradabad and of a 15 biswa 9 biswansi 2 kachwansi 3 tanwansi share in mauza Sherpur, a 15 biswa 9 biswansi 2 kachwansi 3 tanwansi share in Sarai Kazi, a 15 biswa share in Rustampur Mayat and a 15 biswa share in Shahjahanpur Hyat, the zamindari villages in pargana Hasanpur, together with all the cultivable and uncultivable lands, 'abadi,' houses that are let on rent, artisan's cess, grazing charges, barren land, water produce, tanks, lakes, groves, fruits and timber trees, etc., all the inherent and adventitious rights and interests in the revenue paying zamindari property in the said villages, and also of two pakka 'havelis' (houses) in mauza Sherpur aforesaid, in favour of Jagannathji Maharaj, installed in the temple at Jagannathpuri

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and of Anant Ram, son of Gobardhan, 'khurd' (junior), resident of Puri aforesaid, and Jai Ram, son of Bhawani Das, resident of Durgapur, appertaining to Puri aforesaid, district Katak, both the Pandas of Jagannathji Maharaj. But no document was executed at the time the 'shankalp' was made. Now this document is executed with the following conditions:—Both the Pandas aforesaid should enter into possession and make management of the aforesaid property and after paying the Government revenue and village expenses out of the annual income, spend half of the net profits on the daily 'bhog' (food offering) of Jagannathji Maharaj, and bring the other half to their own use, in equal shares. After them, their descendants and successors should enter into possession and enjoyment, generation after generation, and should, in due order, distribute the profits, according to the specification given above and daily spend money on the 'bhog' of Maharaj. Whoever will be my successor and representative after me shall have no claim or objection to the gifted and endowed property, by reason of the execution of this deed. If, perchance, they bring any claim it shall not be entertainable by the court, inasmuch as the property of which I have made a charitable gift and 'shankalp' is of the nature of 'devatra' (?) and 'tulsipatra' property. According to the Hindu Law, the income of the said property is not such as may be brought by me or my successors to our own use. The said property is the self-acquired and exclusive property of my deceased husband, Raja Gur Sahai. I have made a charitable gift and 'shankalp' of the property for the salvation of my husband and his family members and for my own salvation. The gift property is worth Rs. 2,500. I have, therefore, executed these few presents by way of a deed of gift, so that they may serve as evidence and be of use when needed."

It purports to have been executed for the lady by her general attorney Ajab Singh, and a question was raised on behalf of the plaintiffs that the deed of gift was fraudulently executed by Ajab Singh in collusion with the donees, and was not the act of the Rani herself. In the view he took of the case the Subordinate Judge did not deal with the question of the authenticity of the document, but the High Court, on the examination of the evidence, came to the conclusion that the deed was the deed of Rani Kishori. The contention against the genuineness of the document has not been pressed before the Board, and their Lordships think upon the evidence there is no real foundation for the charge that it was not the act of the Rani. Before the first court the trial proceeded on the question of the power of the lady to make an alienation, the plaintiff contending that it was invalid, while the defendants urged that it was fully within her competency. The Subordinate Judge decided in favour of the plaintiffs on two grounds—first, that it was not competent for

the lady to make the alienation, as it was not for the performance of any religious duty which amounted to a necessity under the Hindu law; the second ground of his decision was that the lady had abundant means for giving effect to her pious intention, the *sankalpa*, to which she refers in the deed of gift, and that consequently the gift was invalid. He accordingly made a decree in favour of the plaintiffs. On appeal the High Court came to a different conclusion. They held that her alienation, although not in performance of a necessary duty, was nevertheless a pious act and was, therefore, valid. They held also that the lady had inherited a large estate, and that the dedication covered a very small fraction of the property, something like one-seventy-fifth. They accordingly dismissed the plaintiff's suit.

On appeal to the Board the question has been argued with great ability and fullness by counsel for the appellants who are Lalta Singh's representatives.

The earlier cases bearing on the question cited from Sutherland's Weekly Reporter, extending from 1864 to 1873, no doubt give colour to the view taken by the Subordinate Judge, and their Lordships have little doubt that he was largely influenced in his conclusion by the notion that justifiable necessity for the validity of religious alienation must be of the same character as in the case of alienation for secular purposes. This idea seems to be predominant in the minds of the learned Judges who decided the cases reported in the Weekly Reporter. Their Lordships cannot help regarding the criticism of the High Court on the Subordinate Judge's judgment as unduly severe. In support of the plaintiff's contention the Board were referred to the paragraph 105 in the *Vyavastha Chandrika*, vol. I, page 138:—

"Without the consent of her husband's reversioner a widow is, however, competent to sell so much, and no more, of his property as may be required for the performance of the indispensable duties (nitya-karma). If such acts cannot be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties *must* be performed. But for the performance of an optional religious act (Kamya karma) she may, without their consent, dispose of only a small portion of the estate."

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Then follows paragraph 106, which, it is contended, imposes a further limitation on her power :—

"If, however, the expenses for those acts including maintenance could possibly be defrayed with the accumulated wealth, or with the income of the estate left by the deceased, then his widow cannot sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purpose."

The commentator's note to paragraph 105 is as follows :—

"An indispensable act or duty (nitya-karma) is that which *must* be performed, and cannot be neglected without sinning, as the first sraddha of the father or of the husband, the marriage of his daughter, or the like. And an optional religious act is such as the performance of it rests upon option, and there is no sin on the non-performance, but religious merit (punya) on the performance thereof, as pilgrimage to Benares and the like."

Reference was also made to the dictum of their Lordships in the case of *Collector of Masulipatam* v. *Cavaly Venkata Narrainapah* (1) where the Board pointed out the difference between alienations made by a widow for secular purposes and those made with religious motives. The Master of the Rolls, who delivered the judgment in that case, says as follows :—

"It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity."

In *Raj Lukhee Dabea* v. *Gokool Chunder Choudhry* (2) the Board gave expression to the same opinion. In *Rama* v. *Ranga* (3) the Madras High Court laid down that alienation by a Hindu widow for religious purposes must be confined to ceremonies indispensable for spiritual benefit, such as funeral obsequies and the periodical ceremonies incidental to those obsequies. But the learned Judges went on to add :—

"We cannot recognize a sale by a Hindu widow as valid against her husband's reversioner, when it is made in view to raise money for doing pious acts which are not in the nature of spiritual necessities, unless such sale is reasonable in the circumstances of the family, and the property alienated is but a small portion of the property inherited from her husband."

The case of *Ram Kawal Singh* v. *Ram Kishore Das* (4) has no analogy to the present. There the alienation was not

(1) 8 Moo I. A., 529, 550, 551.
(2) 13 Moo. I A., 209.
(3) (1885) I. L. R., 8 Mad., 552.
(4) (1895) I. L. R., 22 Calc., 506.

for the maintenance of an idol which had been established by the husband of the widow, and the dedication was *primâ facie* for the widow's own spiritual welfare and not for the husband.

There can be no doubt upon a review of the Hindu law, taken in conjunction with the decided cases, that the Hindu system recognizes two sets of religious acts. One is in connection with the actual obsequies of the deceased, and the periodical performance of the obsequial rites prescribed in the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned Judges. The confusion which has arisen in this case arises from mixing up the indispensable or obligatory duty with a pious purpose which, although optional, is spiritually beneficial to the deceased.

With reference to the first class of acts, the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and, if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself, is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purpose she may have in view. In the present case the High Court has found that the lands alienated form a small fraction of the whole estate. Had the Rani made the alienation for the purpose of defraying the expenses of the pilgrimage itself, while she possessed ample means for the performance of the journey and other acts connected therewith, there might have been some substance in the objection that she was not entitled to alienate any part of the immovable property, having ample means at her disposal. But the alienation she has purported to effect was for the perpetual performance of acts recognized in the Hindu system as pious. It was a dedication of a very small fraction of the property. The law with reference to this part of the case appears to their Lordships to have been set out with considerable

teaches that there is a city on the far eastern [illegible] which priest and
pariah are equal in the presence of the 'Lord of the World.' In the courts
of Jagannath, and outside the Lion Gate, [illegible]
join in the celebration of eating the body [illegible] of which
overleaps all barriers of caste, race and [illegible]
rejects food from a Christian's hand. The worship [illegible]
aims at a Catholicism which embraces every [illegible]
every Indian conception of the deity. He is Vishnu [illegible]
form and of whatever time men can speak [illegible]
aboriginal tribe, the mind [illegible] of
spiritualities of the great Indian religions [illegible]
Besides, this representative Vishnu in all his [illegible]
have superadded the worship of the other [illegible]
in their various shapes, and the disciple of [illegible]
beloved rites, and some form of his chosen deity, [illegible]

In their Lordships' opinion the Hindu law [illegible] the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continued benefit of the soul of the deceased owner. It is clear in this case that the act which the Rani did was fully in accordance with Hindu religious sentiment and religious belief, and was not, therefore, in excess of her powers, having regard to the fact that the dedication related to one-seventy-fifth of the property, and was made specially for the creation of a permanent benefit. The dedicated property has now passed into other hands. What the legal position of the defendants, who are assignees from the original grantees, may be with reference to the obligations created by the deed of gift is a matter that does not arise in the present case, and on that their Lordships do not express any opinion.

On the whole their Lordships are of opinion that there is no substance in the present appeal and that it should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitor for appellants: *H. S. L. Polak.*

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learns that there is a city on the far eastern shore, in which priest and peasant are equal in the presence of the 'Lord of the World.' In the courts of Jagannath, and outside the Lion Gate, 100,000 pilgrims every year join in the sacrament of eating the holy food, the sanctity of which overleaps all barriers of caste, race and hostile faiths. A Puri priest will receive food from a Christian's hand. The worship of Jagannath, too, aims at a Catholicism which embraces every form of Indian belief and every Indian conception of the deity. He is Vishnu, under whatever form and by whatever title men call upon his name. The fetishism of the aboriginal races, the mild flower-worship of the Vaishnavas and the lofty spiritualities of the great Indian reformers have all found refuge here. Besides, thus representing Vishnu in all his manifestations, the priests have superadded the worship of the other members of the Hindu Trinity in their various shapes; and the disciple of every Hindu sect can find his beloved rites, and some form of his chosen deity, within the sacred precincts."

In their Lordships' opinion the Hindu law recognizes the validity of the dedication or alienation of a small fraction of the property by a Hindu female for the continuous benefit of the soul of the deceased owner. It is clear in this case that the act which the Rani did was fully in accordance with Hindu religious sentiment and religious belief, and was not, therefore, in excess of her powers, having regard to the fact that the dedication related to one-seventy-fifth of the property, and was made specially for the creation of a permanent benefit. The dedicated property has now passed into other hands. What the legal position of the defendants, who are assignees from the original grantees, may be with reference to the obligations created by the deed of gift is a matter that does not arise in the present case, and on that their Lordships do not express any opinion.

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Appeal dismissed.

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BAIJNATH LAL v. COLLECTOR OF MORADABAD

Upon appeal to the High Court the decision was reversed, and a decree made remanding the suit for the trial of other issues. The learned Judges PIGGOTT and WALSH, JJ., held that in the absence of evidence to the contrary, the endorsement of the sub-registrar proved that the power of attorney was duly authenticated by him. They were of opinion that the Court was entitled to assume that the sub-registrar had acted in the proper exercise of his powers under the proviso to section 33 of the Act. They held, further, that the presentation of the document in July, 1912, could be regarded as sufficient, without unduly straining the law, if there was a defect they considered that it was curable by section 87.

1922, May 22. De Gruyther, K. C., and *Dube* for the appellant.

The mortgage was not validly registered under the Indian Registration Act, 1908, and was consequently inoperative under section 49. The onus was upon the respondent to prove the facts. The presentation in February, 1911 was defective, there is no proof that there was a power of attorney complying with section 33. The decision of the Board in *Jumba Prasad* v. *Muhammad Aftab Ali Khan* (1), is conclusive in the appellant's favour, it shows that the sub-registrar had no power to certify. The subsequent presentation in July, 1912, did not comply with section 32. Even if the first presentation is to be treated as duly made, the effect of section 75, sub-section 2, is that there had to be another presentation complying with section 32 after the order was made.

Dunne, K. C., and *Kenworthy Brown*, for the respondent. *Jumba Prasad's case* (1) is distinguishable. The endorsement then was merely that the document was presented by a person who purported to be the general agent under a power of attorney, and it was proved that the power of attorney in question had not been duly authenticated. As appears from the sub-registrar's second endorsement, he refused to register merely because the execution was not admitted. In these circumstances the first endorsement is *prima facie* evidence that the power of attorney was duly authenticated, and the presentation duly made and

(1) (1914) I. L. R., 37 All., 49 : L. R., 42 I. A., 22

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registration refused." Section 35 relates solely to the admission of execution of the deed and as the mortgage deed not appear, the Sub-Registrar was right in refusing registration, leaving the interested parties to appeal to the District Judge under section 73 (see *In re Shaik Abdul Aziz* (1)).

It will, therefore, be noticed that the reason why registration was refused had nothing to do with defect in presentation; but as it is now asserted that the original presentation was [illegible] it is important to examine the facts and statutory provisions upon that head. The Registration Act has imposed several conditions regulating the presentation of documents for registration, and it is of great importance that those conditions, framed with a view to meet local circumstances should not be weakened or strained on the ground that they may appear to be exacting and strict.

Section 32 is the first section dealing with the matter, and it is in the following terms:

"32. Except in the cases mentioned in sections 31 and 89, every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office,

(*a*) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(*b*) by the representative or assign of such person, or,

(*c*) by the agent of such person, representative or assign, duly authorized by power of attorney executed and authenticated in manner hereinafter mentioned."

The exceptions mentioned in sections 31 and 89 need not be considered as they have nothing to do with the present case.

Presentation here was not made in person, it was made under sub-section (*c*) by an agent empowered to be authorized by a power of attorney. Such power of attorney must not be general in its form, but must confer the special authority to present on behalf of the principal, and even though the Sub-Registrar accepts the presentation under a general power of attorney, it is open to any interested party to show that the power of attorney was in fact imperfect. See *Jumbu Prasad* v. *Muhammad Afzal Ali Khan* (2). The fact that the presentation is accepted

(1) (1897) I. L. R., 11 Bom., 691. (2) 1911) I. L. R., 37 All., 19 [illegible]

42 I A, 21

registration refused." Section 35 relates solely to the admission of execution of the deed, and as the mortgagor did not appear, the Sub-Registrar was bound to take the course he did, leaving the interested parties to appeal to the Registrar under section 73 (see *In re Shaik Abdul Aziz* (1).

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(1) (1897) I. L. R., 21 Bom., 631. (2) (1914) I. L. R., 37 All., 10: L. R., 42 I. A., 22.

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by the Sub-Registrar as in proper form is, however, *prima facie* evidence that the conditions have been satisfied; and after such acceptance, the burden of proving any alleged informality rests on the person who challenges the registration. In the present case no question arises upon the character of the power; it has not been put in evidence and, having been formally accepted by the proper official, it may be regarded as complying with the provisions as to its character imposed by section 32, sub-section (*c*).

By section 33, however, special conditions are established with regard to the execution of such a power of attorney. This section provides that certain powers of attorney shall alone be recognized, viz., sub-section (*a*):—

"(*a*) If the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides."

It is said that in this case that condition has not been satisfied, because the Sub-Registrar's certificate, which was endorsed on the document on the 5th of February, 1921, in the following terms,—

"Presented by Pandit Nanak Chand, son of Pandit Tara Chand, caste Brahman, professional lawyer, resident of Moradabad, mohalla Raja Gali, at the office of the Sub-Registrar, Moradabad, this 5th day of February, 1912, between the hours of 3 and 4 p.m. on behalf of Sahu Parshadi Lal under a special power of attorney duly authenticated in this office on the 3rd of February, 1912.

"(Signed) SHAM BEHARI LAL, officiating S.R."

does not refer to the fact that the power of attorney was executed before the Sub-Registrar. The endorsement is certainly lax in this respect, but it is made under no statutory obligation, and it has no statutory effect; it is only the evidence to show that the presentation has been accepted by the Sub-Registrar and its acceptance by him, he being the officer whose business it is to see that all essential regulations are regarded, is *prima facie* evidence that the power of attorney was regular in all respects. So far as the original presentation is concerned, therefore, their Lordships think that there is nothing to displace the inference that it was duly made, arising from the fact of its acceptance

by the Sub-Registrar. His refusal to register was due to the circumstances which have already been narrated, and in due course appeal was had to the Registrar by the present respondents.

On the 28th of June, 1912, the District Registrar ordered registration, following upon which, on the 22nd of July, the Collector of the Court of Wards forwarded the mortgage and the copy of the order by post to the Sub-Registrar and asked for registration. The order of the 28th of June, 1912, removed the difficulty that prevented registration in the first instance, and accordingly, on the 23rd of July, 1912, the Sub-Registrar accepted the document for registration and made upon it the following endorsement:—

"Having seen the order of the District Registrar, Moradabad, dated 28th June, 1912, I have satisfied myself that the execution of the document was proved before the said officer, and the document is therefore accepted for registration.

"(Signed) SHER SINGH, officiating S.R.

23rd July, 1912."

And it was registered accordingly.

It is objected that such registration was bad because the presentation to the Sub-Registrar after the District Registrar's order ought to have been made with the same formalities as those necessary for the original presentation, and this, according to the appellant's contention, is the only meaning that can be given to sub-section (2) of section 75, which is in the following terms:—

"75.—(1) If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered.

"(2) If the document is duly presented for registration within thirty days after the making of such order, the registering officer shall obey the same, and thereupon shall, so far as may be practicable, follow the procedure prescribed in sections 58, 59 and 60.

"(3) Such registration shall take effect as if the document had been registered when it was first duly presented for registration."

The weight of this argument depends upon the phrase "duly presented," and it is pointed out that the subsequent use of the same words in sub-section (3) shows that "duly presented" means presented in accordance with all the formalities imposed by section 32.

APPELLATE CIVIL.

1921 March, 17.

Before Mr. Justice Lindsay and Mr. Justice Stuart

SRI RAM AND OTHERS (DEFENDANTS) v. SOBHA RAM, GOPAL RAI (PLAINTIFFS).*

Act No. I of 1872 (Indian Evidence Act), section 92—Evidence—Admissibility of—Promissory note—Subsidiary agreement that payment was not to be demanded until settlement of accounts.

Held that the executant of a promissory note could not be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Lalit Mohan Banerji*, for the appellants.

Dr. *Surendra Nath Sen* and Munshi *Kumudu Prasad*, for the respondent.

LINDSAY and STUART, JJ.:—In our opinion there is no merit in this appeal. The suit was brought by a firm of commission agents, doing business at Hapur, against another firm carrying on business in grain, in the Meerut city. This firm is said to consist of three persons, Narain Das, Sri Ram and Ram Nath, who were impleaded as defendants. It is stated that the defendant firm is carried on in the names of Narain Das and Sri Ram.

The case for the plaintiff firm was that on the 4th of August, 1917, a promissory note was passed in their favour by the defendant firm for a sum of Rs. 4,071-4-0. It was alleged that this amount, which carried interest at the rate of 6 per cent. per annum, was to be payable on demand. The plaintiff alleged the demand made and the refusal of the defendant firm to pay. Hence the suit.

The main defence which was set up by the defendant firm is contained in paragraph 8 of the written statement. While it was not denied that the promissory note upon which the suit was based was executed, it was alleged that, as a matter of fact, the note had not been executed after a settlement of account had

* Second Appeal No. 833 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 27th of November, 1920, confirming a decree of Manmohan Sanyal, Subordinate Judge of Meerut, dated the 24th of November, 1919.

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Held that the existence of a promissory note could not be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but only after the adjustment of some accounts between the parties

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The main defence which was set up by the defendant firm is contained in paragraph 8 of the written statement. While it was not denied that the promissory note upon which the suit was based was executed, it was alleged that, as a matter of fact, the note had not been executed after a settlement of account had

* Second Appeal, No. 331 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 27th of November, 1920, confirming a decree of Manmohan Sanyal, Subordinate Judge of Meerut, dated the 24th of November, 1919.

may be given against the terms of the written document. Proviso I, for example, lays down that any fact may be proved which would invalidate a document—facts such as fraud, intimidation, illegality, etc. There is, however, in the written statement of the defendant firm no allegation whatever of fraud. The only case which is disclosed in the written statement is the case that the written document of contract does not contain the real contract between the parties. In this view of the case all the argument about re-opening of accounts seems to us to be out of place, and so far as the cases* to which we have been referred are concerned, and which are set out in the judgment of the court of first instance, they do not appear to us to have any material bearing on the question with which we are dealing. In our opinion the defendants in this case were not entitled to put forward the plea that they had a right to call for a re-examination of the accounts and to demand a fresh settlement.

The only other point with which we have to deal is the liability of the firm in respect of this note, which admittedly was written by the first defendant, Narain Das. There can be no doubt that the three defendants are brothers, that they are members of a joint family, that they carry on business at Meerut in one shop; and it was admitted that Narain Das, who signed this promissory note, was the managing member of the family. These being the facts, we have no doubt whatever that the defendant firm was liable on the note.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr Justice Walsh and Mr. Justice Ryves

FAZAL ILAHI (PLAINTIFF) *v.* PRAG NARAIN (DEFENDANT) †

Civil Procedure Code (1908), *schedule II, paragraphs* 5, 17—*Reference to arbitration without the intervention of court—Refusal of arbitrator to act—Application to court for order of reference.*

1922 *March*, 20.

In the case of a private arbitrator refusing to act the court may, on the application of either party to the reference, make an order under paragraph 17

*(1) *Puran Mal* v. *Ford MacDonald and Company* (1919) I. L. R., 41 All., 685
(2) *Boo Jinathboo* v. *Sha Nagar Valab Kanji* (1886) I.L.R., 11 Bom., 78

† First Appeal No. 180 of 1921, from an order of Shibendra Nath Banerji, Officiating Subordinate Judge of Allahabad, dated the 19th of August, 1921.

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where there has been a provision for a particular arbitrator who is either dead or refused to act, it is as though there were no provisions. But apart from that we think that the case is entirely covered by the decision in the rather curious case of *Bhagwan Das v. [illegible]* (1), and particularly by the principle laid down in that case which we entirely endorse: "where a party has gone to arbitration in a case in which if he had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17." The decision in the case of *Bala Pattabhrama Chetti v. Seetharama Chetti* (2) really supports the appellant, although the learned Judge did not seem to think it applicable, and the decision which he followed, namely, the case of *Ahmad Nur Khan v. Abdur Rahman Khan* (3), to which a member of this Bench was a party and which both of us endorse, has nothing whatever to do with the question raised in this case. The appeal must be allowed with costs and the matter sent back to the Subordinate Judge with directions to file the agreement of reference and to proceed with the appointment of the arbitrator in accordance with the provisions of the schedule.

Appeal allowed.

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FAZAL ILAHI v. PRAG NARAIN

Before Mr. Justice Lindsay and Mr. Justice Bypes.

MURLIDHAR (DEFENDANT) v PITAMBAR LAL (PLAINTIFF) AND MANNI LAL AND OTHERS (DEFENDANTS).*

1922 *March*, 21.

Civil Procedure Code (1908), *order XXXII, rule 4—Guardian ad litem—Suit by minor to set aside a decree against him on the ground that he was not properly represented in the former suit*

In all cases where a minor subsequently sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into

* Second Appeal No 705 of 1920, from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 26th of February, 1920, reversing a decree of Gauri Shankar Tewari, Subordinate Judge of Allahabad, dated the 19th of December, 1918.

(1) (1921) 19 A. L. J., 853. (2) (1894) I. L. R., 17 Mad., 498.

(3) (1919) I. L. R., 42 All., 191.

where there has been a provision for a particular arbitrator who is either dead or retired. If he has died or refused to act, it is as though there were no provisions. But apart from that we think that the case is entirely covered by the decision in the rather curious case of *Bhagwan Das* v. *Gurdayal* (1), and particularly by the principle laid down in that case which we entirely endorse: "where a party has gone to arbitration in a case in which if he had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17." The decision in the case of *Bala Pattabhirama Chetti* v. *Seethaarama Chetti* (2) really supports the appellant, although the learned Judge did not seem to think it applicable, and the decision which he followed, namely, the case of *Akmal Nur Khan* v. *Abdur Rahman Khan* (3), to which a member of this Bench was a party and which both of us endorse, has nothing whatever to do with the question raised in this case. The appeal must be allowed with costs and the matter sent back to the Subordinate Judge with directions to file the agreement of reference and to proceed with the appointment of the arbitrator in accordance with the provisions of the schedule.

Appeal allowed.

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MURLIDHAR (DEFENDANT) v. PITAMBAR LAL (PLAINTIFF) AND MANNI LAL AND OTHERS (DEFENDANTS).*

1923
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(1) (1921) 19 A. L. J., 823. (2) (1894) I. L. R., 17 Mad., 405.

(3) (1919) I. L. R., 42 All., 191.

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of the said decree the remaining half of the joint family property was not saleable. The property was sold and purchased by Murlidhar, and the sale was confirmed on the 9th of March, 1918. On the 22nd of March 1918, the plaint was amended, Murlidhar was made a defendant, and an additional clause was inserted in the plaint to the effect that in execution of the decree in the said suit the house was sold by auction on the 6th of February, 1918, and was purchased by defendant No. 4, that is, Murlidhar, and an additional prayer was added for a declaration that the said sale was void and illegal. It was alleged in the plaint that the mortgagees, in spite of their having knowledge of the fact that the rights of Ghazi Din were adverse to those of the plaintiff, appointed him the guardian of the plaintiff, and in collusion with him obtained a decree; that in fact there was no lawful guardian of the plaintiff; that the whole proceedings were kept concealed from the mother of the plaintiff who only got to know of the suit when execution was taken out, that Ghazi Din had no power to execute the mortgage deed and that it was not for the benefit of the plaintiff.

The first court found that the mortgage was not made for family necessity or for the benefit of the family. It also found, however, that there was no evidence to show collusion between Ghazi Din and the mortgagees, and that the plaintiff was properly represented in the former suit. It nevertheless dismissed the suit. On appeal the court below upheld the finding that the mortgage was not executed for legal necessity or the benefit of the minor. It further found that Ghazi Din was not a proper person to be appointed guardian in the suit, and on this ground allowed the appeal and decreed the suit.

This appeal is by the auction-purchaser. The connected appeal No. 736 of 1920 is by the mortgagees.

It was argued very strenuously by Dr. *Katju* for the appellant that Murlidhar being a stranger to the litigation "was justified in believing that the court has done that which by the direction of the Code it ought to do": *Malkarjun* v. *Narhari* (1). He further argued, relying on the same case, that the only court competent to decide who was a proper person to be the

(1) (1900) I L. R., 25 Bom., 337.

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minority, shall appoint a proper person to be guardian for the suit for such minor."

Sub-paragraph (3) of the rule provides that an application for the appointment of a guardian "shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed."

Sub-paragraph (4) directs that "no order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian, or to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule." Rule 4 of the same order defines who is a proper person, namely, "any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor." It is further directed that "no person shall, without his consent, be appointed guardian for the suit."

When the mortgagees filed their suit against Ghazi Din and the plaintiff, they stated that the latter was a minor and that he and Ghazi Din formed a joint Hindu family of which Ghazi Din was the *karta*. They filed an affidavit to this effect and stated therein that Ghazi Din had no adverse interest to the minor and was a fit person to be appointed his guardian. They did not state that the mother of the minor was alive.

Thereupon notices were issued to the minor and to Ghazi Din. The notice to the minor was affixed to the door of his house. Ghazi Din was served personally. He endorsed a note on the duplicate returned to court, in the Mahajani character (which the court apparently could not read), refusing to act as guardian. The attention of the court was not drawn to this endorsement either by the serving peon or by anybody else. I do not think, however, that anything turns on this circumstance. It was the duty of Ghazi Din to appear in obedience to

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the notice and object, if so advised. He did not appear, and the court, not unnaturally, concluded from his abstention that he consented, and appointed him guardian without further inquiry. On the date fixed for the hearing of the suit Ghazi Din appeared and confessed judgment both on his own behalf and on behalf of the minor, and the mortgagees' suit was thereupon decreed. There was no irregularity in the procedure laid down in order XXXII, rule 3. But that procedure is only enacted to enable the court to appoint a proper person as a guardian. I think that if the nominated guardian does not appear, the court may assume that he consents to being appointed, but that does not absolve the court from inquiring into the question whether he is a proper person to represent the minor. In fact, where, as here, the mortgage was made by the *karta* of the joint property of himself and the minor, I think even if the *karta* consented to be guardian, a duty was cast on the court to consider whether the *karta*, who could not repudiate his own mortgage, was at all a proper person to represent the minor. It is quite clear that the court could only appoint a proper person as defined in rule 4. If it appoints a person disqualified under that rule, it seems to me it commits an illegality rather than a mere irregularity. Suppose, for instance, the court, merely relying on a false affidavit of a plaintiff, appointed a lunatic to be the guardian *ad litem* of a minor defendant, could it possibly be maintained that the minor was properly represented, and that, even if no steps were taken to defend the minor's interests, nevertheless the minor could never challenge the decree passed against him ?

I think it only necessary to give this instance to show that Dr. *Katju's* main argument is far too broadly stated. In the present case, however, he points out that the person appointed was the *karta*, the natural person to be the guardian and whose interest would not *necessarily* be adverse to the minor's, and it is therefore suggested that the court was right in appointing him.

The case in I. L. R., 25 Bombay, page 337, was considered by their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (1). Lord DAVEY there said (at page 312 of the Report): "Their Lordships agree that the sales cannot be treated as void

(1) (1904) I. L. R., 32 Calc., 296.

or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But, on the other hand, the court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

And later on, at page 314, after giving the facts of the Bombay case, he quoted from the judgment of that case,—'In so doing the court was exercising its jurisdiction It made a sad mistake, it is true, but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed for setting matters right, and if that course is not taken, the decision, however wrong, cannot be disturbed'—and proceeded, "Their Lordships think that these observations do not apply to the case now before them. In suits Nos. 372 of 1879 and 160 of 1878 the Judge seems to have accepted without question the statement on the record that Amir Baksh was legal representative of Naurez and Afabnawaz was his guardian, and never applied his mind to the matter. Doubtless he would have done so if the suits had proceeded in the ordinary course, but in the former case the proceedings were cut short by the agreement for reference and in the latter case it was in effect a consent decree It was not, therefore, the case of an erroneous decision, ruling or exercise of discretion of the Judge in a matter in which the court had jurisdiction. Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was, therefore, without jurisdiction and null and void." I think that these remarks exactly apply here. The court did not apply its mind to the question whether Ghazi Din was a proper person having regard to the proviso to rule 4. If it had only read the mortgage-deed, it must have been put on inquiry.

I think the matter is really concluded by the decision of this Court in *Baijnath Rai* v. *Dharam Deo Tiwari* (1), which was followed in *Ghhattar Singh* v. *Tej Singh* (2). It may be noted that the same argument was raised in that case. Mr. *Agarwala*

(1) (1916) I. L. R., 38 All., 315. (2) (1920) I. L. R., 43 All., 104.

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is reported to have argued (I. L. R., 38 All., p. 317): "The requirements of section 456 of the old Code having been complied with, and the court having once passed an order appointing Bhondu Tiwari as guardian *ad litem*, there is an absolute presumption that the court had satisfied itself on the materials before it that he was a fit and proper person to be so appointed and that he had no interest adverse to that of the minors. Throughout the course of the proceedings in the former suit there was nothing to indicate that he was not such a person or that he had any adverse interest. No exception was taken to the appointment either by Bhondu Tiwari himself or by his adult son who was a defendant in that suit and whose interest, at all events, would be identical with that of his minor brothers. When a guardian *ad litem* has been appointed of a minor defendant in a suit, then, unless the minor shows that the guardian acted fraudulently and in collusion with the plaintiffs, the minor is bound by the decree passed in that suit."

The Court, however, overruled this argument.

From all these authorities which have already been cited, it is abundantly clear that in all such cases where a minor subsequently sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into. Indeed in the case relied on by Dr. *Katju*, *viz.*, *The Collector of Meerut* v. *Umrao Singh* (1), the decision of the Court seems to have been that it was necessary first of all to inquire whether the minor had been prejudiced by the appointment of the guardian, because, if it found that he had not been prejudiced, then it was unnecessary to go into any other question.

Now, it seems to follow that there must first of all be an investigation into the merits. In this case it has been found that Ghazi Din was only 21 years of age when he executed the mortgage. It was stated in the mortgage-deed that the money was borrowed "for home expenses and also for the improvement of the *theka* business in the Sheoghar market." There were no details given of these "home expenses" and it was found by both courts, quite definitely, that the mortgagees' allegations that

(1) (1915) 13 A. L.

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the money was required for the marriage of a daughter and the payment of certain debts were false, and that the *theka* business in the market was a private speculation of Ghazi Din's, and that the minor was in no way concerned in it and go no benefit from it. Having come to this finding, the lower appellate court held that the trial court, having found that the mortgage was invalid against the minor, could not consistently find that the minor was properly represented. He said: "I think that both findings cannot go together. If you once say that the elder cousin mortgaged the property of the minor without proper grounds for the transfer, how can you say that the man who threw away, so to say, the property of the minor was a right and fit person to have been appointed guardian, for the purpose of contesting the very transfer which ought to have been contested in the interest of the minor?"

Now, the real facts were known of course to the mortgagees. They knew, therefore, that the interest of Ghazi Din was adverse to the minor and they deceived the court by their affidavit that he was a proper guardian. I think it is only necessary to cite one more case which, although not mentioned at the Bar, is, I think, very much in point. It is *Hanuman Prasad* v. *Muhammad Ishaq* (1). In that case also the auction-purchaser was a stranger to the mortgage suit. STANLEY, C.J., and BURKITT, J., said: "Now the provisions of section 443 (of the old Code) are imperative." (Section 443 of the old Code is the same in substance as order XXXII, rule 3, (1) of the present Code). "They direct that where a defendant is a minor, the court shall appoint a proper person to be guardian for the suit for such minor, to put in a defence and generally to act on his behalf in the conduct of the case. It is abundantly clear in this case that Munna Das was not a proper person whom the court, if it had been made aware of the facts, would have appointed as guardian. In the first place, he was the mortgagor who purported to mortgage as his own the property which he afterwards alleged was the property of his ward. He, therefore, had a conflicting interest, an interest which should have precluded any court from appointing him as guardian *ad litem* in a suit

(1) (1905) I. L. R., 28 All., 137.

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brought by the mortgagees of Munna Das. It is perfectly clear that the court had not the facts before it, and it also appears to us to be clear that the court was never called upon by the plaintiff, whose duty it was to see that a proper guardian was appointed guardian *ad litem*, to appoint such a guardian. The fact is that Hanuman Prasad was not properly represented as a party to that suit and, therefore, any decree which was passed against him was a mere nullity." For the reasons given above, having regard to the various decisions which have been cited, I think the decree of the court below was right and would dismiss the appeal with costs.

LINDSAY, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves

SHANKAR LAL AND ANOTHER (DEFENDANTS) v. MUHAMMAD AMIN AND ANOTHER (PLAINTIFFS) *

1922

March, 21

Civil Procedure Code, (1908), *section* 105—*Interlocutory order—Appeal*

Where there is some unappealable interlocutory order, its irregularity or any defect in it may, so far as it affects the decision of the case, be raised when the decree in the suit in which it was passed is appealed from, and this power is not affected by the fact of an appeal having been erroneously filed against the order itself and dismissed. *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (1) referred to.

THE facts of this case are fully stated in the judgment of WALSH, J.

Munshi *Kailash Chandra Mital*, for the appellants

Mr. *Hamid Hasan*, for the respondents.

WALSH, J.—This is an appeal from an order of remand. The suit is brought by certain alleged minors through the guardianship of their mother in an effort to redeem property which has been already sold over their heads as the result of a decree for sale obtained in a suit by the mortgagee against their father, the original mortgagor. It has the aspects of being a proceeding of a some what suspicious character, but nonetheless these suspicions have to be confirmed and not inferred. In some respects the attempt which they have made resembles

* First Appeal No. 396 of 1931, from an order of Abdul Halim, Subordinate Judge of Meerut, dated the 5th of August, 1921.

(1) (1920) I. L. R., 47 Calc., 924

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Walsh, J.

the case referred to in the judgment of the court below, namely, *Ganpat Lal v Bindbasini Prashad Narayan Singh* (1), where the Privy Council pointed out that after the sale has taken place, (they are speaking of a mortgage), the owner holds as purchaser and is entitled to raise all the defences belonging to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action, the court cannot interfere with the possession given to him by his purchase. The plaintiffs finding that the mortgagee had purchased, applied to the trial court, before the hearing, for liberty to amend their pleadings, so as to challenge the sale, very much on the lines of their Lordships' opinion which I have just quoted. The first court refused leave to amend. There was an appeal from that order, and, as the order was unappealable, the appeal was not unnaturally dismissed. One of the points urged upon us by the appellants is that the question of amendment has been concluded by that unsuccessful appeal. We do not agree with that. We think it is one of those cases which section 105 provides for, namely, where there is some unappealable interlocutory order, its irregularity or any defect in it may be raised when the decree is appealed from, so far as it affects the decision of the case. There is no doubt that the refusal to amend affected the decision of the plaintiffs' case by shutting them out from the alternative claim which the Privy Council has pointed out is really a condition precedent. We entirely agree with the general observations of the lower appellate court in reference to the refusal to amend. Whatever the merits of the case may be, which is sought to be made out, it is just one of those cases in which the court ought to allow amendment, if it is satisfied that the application is made *bonâ fide*. As the lower appellate court says, it would not alter the nature of the suit, to use a somewhat popular but vague expression, because the original prayer and the amended prayer stand together and one leads to the other and the new prayer would be a new and additional claim, but not an inconsistent one. The order for remand was, therefore, right. We would further point out that it still remains to be decided whether the sale ought

(1) (1920) L. R., 47 Calc., 924.

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Walsh, J.

to be set aside. That depends on two questions. First, whether the minors are really the persons who ought to have been impleaded at all. Their claim to have been impleaded arises out of a deed of *waqf*, subsequent in date to the mortgage-deed, of which the mortgagees apparently were not in the least aware. As is pointed out in Mr. Agarwala's notes to the Code, it is by no means clear that, although the final provision which used to be contained in section 85 of the Transfer of Property Act has been removed, rule 1 of order XXXIV which has taken the place of section 85 means anything more than that the defendant ought to raise the question whether all the parties have been properly impleaded. If the plaintiff omits to do so, and the plaintiff can hardly do so if he has no knowledge of the existence of the persons alleged to be interested, it does not necessarily follow that the decree is not binding where the defendant, in the interest of the person who subsequently complains, (in this case it is merely the case of a father and his minor children), abstains from raising the objection. Secondly, there is the further question, whether on the form of the deed, the present minor plaintiffs had any interest in the equity of redemption. The deed does not, in my opinion, purport to be a transfer of the property to them. It is a declaration of trust vesting in them a contingent future interest subject to their father's life, and, as a matter of strict interpretation, it is to my mind doubtful whether they were persons who had an interest in the equity of redemption at the time of the suit, so as to make them persons contemplated by this rule. Thirdly, the question will have to be decided whether the suit, including the application for amendment, is honestly brought. The deed of *waqf* is subsequent in date to the mortgage. The existence of the decree and the sale of the property were ignored. It is possible that the *parda-nashin* guardian of the two minors knew nothing about them, and that their pleader only learnt of the existence of the sale and the decree from the written statement. That opens up the question whether they knew anything about the mortgage either. If they knew nothing of the decree and the sale, it is probable that they knew nothing about the mortgage, and therefore, the question will have to be considered

whether this suit is really a suit brought by the minors through their guardian in the honest assertion of their natural rights and in order to test this question, or whether it is a sham suit brought in their names by the father in order further to re-open the litigation which has already taken place and has been decided against him. Upon this question it is to be borne in mind that the deed of *waqf*, which has been read to us, recognizes the existence of the mortgage. That is a point which might possibly, when the matter comes to be fully considered, cut both ways, and shows that the existence of the mortgage was not concealed. On the other hand, it rather indicates that the security for the mortgage debt was excluded from the operation of the trust. I have said this much because I think it possible that the order of remand will not result in anything substantial to the plaintiffs, although I recognize that it is still an open question; but it is obvious that when the amendment is allowed, the nature of the suit is altered to this extent that it will require a re-settlement of a large number of issues, some of which I have already indicated in the observations I have made in the course of this judgment. I would accordingly dismiss the appeal and would modify the order of the court below as regards costs to this extent that I direct the costs in the lower appellate court and in this Court to abide the result of the amended suit.

RYVES, J.—I agree with the order proposed, but the suit must be tried out on the merits. I express no opinion as to the interpretation, validity or effect of the *waqf* deed or as to the *bonâ fides* of the plaintiffs or anybody else connected with this litigation. These are all matters which have to be decided on evidence which has not yet been produced on either side.

BY THE COURT:—The order of the Court is that the appeal is dismissed, the order of remand confirmed, and the amendment as directed by the lower appellate court must be allowed by the trial court. But this involves, and we direct, that the defendant must be allowed to make such amendments in his written statement as are rendered necessary by the amendment in the plaint, and both parties must be allowed to produce any material evidence with regard to the amended claim. The costs in the

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lower court and in this Court up to date, will abide the result of the suit.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

1922
March, 24.

EMPEROR v. BADRI PRASAD *

Act No. XLV of 1860 (Indian Penal Code), sections 390 and 392—Robbery—Sentence of fine only not legal—Principles guiding the infliction of a sentence of whipping

For an offence under section 390 of the Indian Penal Code it is not permissible to award a sentence of fine only without imprisonment.

Remarks on the principles which should guide the infliction of a sentence of whipping.

THIS was an application in revision, admitted on the question of sentence only, from a conviction under section 390 of the Indian Penal Code. The facts of the case sufficiently appear from the judgment of the Chief Justice.

Mr. *N. C. Vaish*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

MEARS, C. J.:- In this case one Badri Prasad was convicted by a Magistrate of the first class of Aligarh. The prosecution case against him was that he with two other companions, on the evening of the 21st of January, followed three servants who were going to the house of their master, Jarao Lal, and who had at the time with them some money and a considerable quantity of valuables, said to be worth about Rs. 700. When two of the servants had entered the shop of their master, Badri Prasad was proved to the satisfaction of the Magistrate to have struck the third and rearmost man, Jwala Prasad, with a stout *danda* on the head; and, in the confusion which resulted, either Badri Prasad or one of his associates got hold of the box containing the valuables and got away with it. The blow struck was not a severe one. After that Badri Prasad ran away. The man who had been struck was apparently able to follow him and

* Criminal Revision No 80 of 1922, from an order of K. A. H. Sams, Sessions Judge of Aligarh, dated the 18th of February, 1922

somebody or other caught Badri Prasad, he having slipped up. In these circumstances, the Magistrate inflicted a fine of Rs. 100, with an alternative period of imprisonment if that fine was not paid, and sentenced Badri Prasad also to thirty stripes. Badri Prasad preferred an application in revision to this Court, and it has been admitted upon the question of sentence only, and at the same time notice has been served on him to show cause why the sentence should not be enhanced or otherwise altered. This was a charge under section 390 and the penalty is prescribed under section 392. An examination of that section shows that a fine alone is not a permitted punishment for a robbery. Robbery, under these circumstances, may be punished by rigorous imprisonment and by a fine, and in certain cases by whipping in addition. But the Magistrate erred in law in sentencing the accused to a fine, and a fine unaccompanied by imprisonment. We have got the whole matter before us, and I personally wish to say and I wish it to be known, that, in my view, when a person inflicts pain upon another and when the offence is one which permits of the penalty of whipping, I think it a good thing to inflict that penalty. There are, of course, circumstances in which the actual hurt caused is very slight, and that is a circumstance to which attention has to be paid; and though I myself should certainly have reduced the number of stripes awarded to this young man in this case, I should not have eliminated the punishment of whipping altogether, but I see that there are other points of view in this case. The accused is a young man, a Brahmin, and the degree of injury which he inflicted on Jwala Prasad was extremely slight, perhaps, in a sense, negligible. Therefore I defer very gladly to what I have no doubt is, in this case, Mr. Justice BANERJI'S better judgment in the matter. I am quite in accord with him that there must be a substantial period of imprisonment and, therefore, we alter the nature of the punishment which Badri Prasad must undergo and we sentence him to twelve months' rigorous imprisonment, with effect from the date of his arrest. We maintain the sentence of fine, with the alternative period of imprisonment if that fine be not paid, and we wipe out that part of the sentence which orders him to receive a whipping.

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BANERJI, J :—I am of opinion that the court below was wrong in not inflicting on the appellant a sentence of imprisonment. A sentence of imprisonment is an essential sentence under section 392 of the Indian Penal Code. To this sentence a fine may be added, and under section 4 of the Whipping Act a sentence of whipping may be imposed where, in the commission of a robbery, hurt is caused. Therefore, the sentence of fine only was an illegal sentence, and a sentence of imprisonment ought to have been imposed. The sentence of whipping was not an illegal sentence, but in the circumstances of the present case I think the sentence of whipping should not have been inflicted. That is a punishment which, in view of the provisions of the Whipping Act, as amended, should be inflicted in cases where there is a certain amount of aggravation in the commission of the original offence. In the present case, the offence was the first offence, so far as is known, committed by Badri Prasad. He is a young man and is a shop-keeper. The hurt caused was obviously slight. A sentence of twelve months' rigorous imprisonment would, in my opinion, be a sufficiently deterrent punishment, so far as he is concerned, in addition to the fine which the court below imposed on him. I, therefore, agree in the order proposed by the learned Chief Justice.

Sentence altered.

APPELLATE CRIMINAL.

Before Mr. Justice Gokul Prasad.

1922
March, 24

EMPEROR *v.* SHUJA-UD-DIN AHMAD.*

Criminal Procedure Code, sections 234 and 235—Joinder of charges—Act No. XLV of 1860 (Indian Penal Code), sections 408 and 477A—Illegality

It is not legal to try an accused person at the same trial on three charges under section 408 and one under section 477A of the Indian Penal Code. *Emperor* v. *Shee Saran Lal* (1) followed.

THIS was an appeal against convictions under sections 408 and 477A of the Indian Penal Code passed by the Sessions Judge of Benares. The principal ground of objection was that of

* Criminal Appeal No. 121 of 1922, from an order of A. G. P. Pullan, Sessions Judge of Benares, dated the 8th of February, 1922.

(1) (1910) I. L. R., 32 All., 219.

misjoinder of charges. The facts material to this report appear from the judgment of the Court.

1922

EMPEROR v. SHUJA-UD DIN AHMAD.

Munshi *Kumuda Prasad*, for the appellant.

The Government Pleader (Munshi *Sankar Saran*), for the Crown.

GOKUL PRASAD, J.—In this case the appellant Shuja-ud-din has been convicted of the offence of criminal breach of trust by a public servant in respect of three items, and also of falsification of accounts in order to conceal the defalcations, under section 477 A of the Indian Penal Code. He appeals, and one of the grounds pressed before me by the learned vakil for the appellant is that there has been a misjoinder of charges which vitiates the trial. The charge on which the accused was committed to the Sessions Court was admittedly different. The learned Judge amended the charge before the trial, and the accused has been convicted and sentenced. It is urged before me that sections 234 and 235 of the Code of Criminal Procedure do not warrant such a joinder of charges, that is, three under section 408 and one under section 477A of the Indian Penal Code. I was at first inclined to the view that this could be done, having regard to the provisions of section 235 read with the provisions of section 234, but I find that in a similar case the contrary view was taken by TUDBALL, J. See *Emperor* v. *Sheo Saran Lal* (1). I agree with the view of the law taken therein. I, therefore, allow the appeal, set aside the convictions and sentences and order the retrial of the appellant on the charges preferred against him in accordance with the law. It will be open to the Sessions Judge to divide the charges into two or three trials as he thinks fit.

Appeal allowed and retrial ordered.

(1) (1910) I. L. R., 32 All., 219.

APPELLATE CIVIL.

1922
March, 27.

Before Mr. Justice Piggott.

KANHAIYA LAL AND ANOTHER (DEFENDANTS) *v.* SETH RAM SARUP (PLAINTIFF)*.

Act No. VII of 1870 (Court Fees Act), section 7, sub-section (iv) (f)—Suit for accounts—Appeal against preliminary decree—Court fee.

Where the defendant in a suit for accounts appeals against a preliminary decree passed against him, he is entitled to put his own valuation on his memorandum of appeal and pay the court fee on that valuation. He is not bound to accept the valuation given by the plaintiff in his plaint.

Bhola Nath v. *Parsotam Das* (1) referred to. *Dhugati Srinivasachariu* v. *A. Perundevamma* (2) doubted.

THIS was a reference made to the Taxing Judge as to the proper court fee payable upon a memorandum of first appeal.

The facts out of which the reference arose are fully set forth in the order of the Taxing Judge.

Dr. *Surendra Nath Sen*, for the appellants.

PIGGOTT, J. :—This memorandum of appeal has been laid before me as Taxing Judge in order that the question of the court fee payable in respect of the same may be finally determined. The suit was one "for accounts," within the meaning of section 7 (iv) *(f)* of the Court Fees Act (No. VII of 1870). It was incumbent on the plaintiff to state the amount at which he valued the relief sought, and the amount of the fee payable under the said Act was to be computed on this valuation. The plaintiff accordingly valued the relief sought by him at a sum of Rs. 8,000 and paid the necessary court fee. The court below has passed a preliminary decree which calls upon the defendant to render a true account of the transactions in suit. The defendant by his memorandum of appeal seeks to have this decree set aside, not because he denies his liability to render accounts, which he has all along admitted, but because he takes exception to the form of the decree and contends that it ought to have contained a specification of the period over which the liability to render accounts should extend and an adjudication upon a question which the defendant had raised as to the period of limitation applicable to a portion of the plaintiff's claim. The defendant,

* Stamp Reference in First Appeal No. 120 of 1922

(1) (1910) I. L. R., 32 All., 517 (2) (1915) 30 M. L. J., 402.

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KANHAIYA LAL v. SUKH RAM SAHUP

as appellant in this Court, originally sought to file his appeal on a fixed fee of Rs. 10. He was undoubtedly liable to pay an *ad valorem* fee, as is sufficiently obvious from the wording of the section itself and was determined by a learned Judge of this Court in his decision in *Bhola Nath* v. *Parestam Das* (1). Now, the appellant in this Court had originally valued his appeal at the sum of Rs. 8,000, as stated in the plaint, but when called upon to pay an *ad valorem* fee, he asked to be permitted to amend the valuation. This permission was granted and he has amended the valuation by stating that the relief sought by him in his appeal to this Court is worth to him no more than Rs. 200. On a formal objection taken by the Stamp Reporter to this Court, the matter has been ordered to be laid before me for adjudication. There is no doubt that the Madras High Court, in the case of *Dhupati Srinivasacharlu* v. *A. Perindevamma* (2), has held that in a matter of this sort the valuation put by the plaintiff on his plaint must be accepted by the appellant in any appeal which he may bring against the decree of the trial court. I do not know if the learned Judges who formulated this decision were thinking only of a preliminary decree, or had in mind the possibility of an appeal against a final decree in a suit for accounts. It seems sufficiently obvious that in the latter case the valuation put upon the plaint by the plaintiff could not possibly determine the correct valuation and, therefore, the proper court fee stamp for the memorandum of appeal. Taking the present case as an instance, it is quite conceivable that when the trial court came to work out the accounts it might find that the sum due to the plaintiff was either very much less or very much more than Rs. 8,000. In the latter case, of course, the provisions of section 11 of the Court Fees Act (No. VII of 1870) would protect the fiscal interests of the State. In either case, it is beyond question that the defendant, if he desired to appeal, would have to value his memorandum of appeal at the amount of the decree actually passed against him, whatever that amount might be. I mention these considerations merely because they raise a doubt in my mind as to the correctness of the view taken by the Madras High Court. The point for

(1) (1910) I. L. R., 33 All., 517. (2) (1915) 30 M. L. J., 402.

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determination before me is, however, the proper valuation of an appeal against a preliminary decree. Looking at the matter apart from technicalities, I think it obvious that it would be inequitable, and might produce serious hardship, to apply in all cases of this nature the principle insisted upon by the learned Judges of the Madras High Court. Taking the facts of the present case, so far as they are disclosed by the pleadings, they afford an illustration of my point. The plaintiff comes into court claiming a settlement of accounts and alleging that at least Rs. 8,000 will be found due to him upon such settlement: naturally he is required to pay a court fee upon the sum of Rs. 8,000. The defendant does not deny that he is under some liability to render accounts, but contends that on such rendition of accounts, and after a proper application of the Statute of Limitation to certain portions of the plaintiff's claim, the amount found due in favour of the latter will prove to be a trifling sum, if any. The court of first instance has passed a preliminary decree directing the defendant to render accounts. It seems to me quite irrelevant to say that the defendant is appealing against the whole of that decree; he could scarcely, as a matter of form, appeal against a part of it. The fact remains that he takes exception to the form of the decree which has been passed. He has nowhere abandoned or modified in the least his essential plea on the merits, namely, that the sum legally due from him will prove upon a proper examination of the question of accounts to be something far less than the amount stated in the plaint. There seems no principle of equity upon which the defendant can reasonably be debarred from maintaining his appeal against this preliminary decree unless and until he is prepared to pay an *ad valorem* fee upon the entire sum stated by the plaintiff in his plaint.

The words of the section to be interpreted are as follows:—

"The amount of fee payable under this Act in suits for accounts shall be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." Those words, as they stand, are clearly in favour of the appellant's contention and, as I have already pointed out, I cannot see any principle of equity upon which it can be suggested that the

appellant to this Court is not within his rights when he says that the success of the appeal which he desires to prefer to this Court will not be worth to him a larger sum than Rs. 200. The learned Judges of the Madras High Court seem to me to have in effect added the words "and the valuation given in the plaint shall be accepted in the memorandum of appeal" to the section, and the real question is whether there is any warrant in the context for doing this. If such warrant is to be found anywhere, it is in the words which immediately follow those already quoted by me. These words are:—"In all such suits the plaintiff shall state the amount at which he values the relief sought." It is no doubt a little difficult to understand why the Legislature should have felt it necessary to add this proviso in respect of the plaintiff, without in express terms laying any analogous obligation upon the appellant. The answer seems to be that this proviso governs the whole of the suits falling under clauses *(a)*, *(b)*, *(c)*, *(d)*, and *(e)*, as well as under clause *(f)*, of sub-section (iv) of section 7 of the Court Fees Act. In some of these cases no question of the passing of a preliminary decree can possibly arise, and the Legislature was probably of opinion that, in most instances at any rate, when once the trial court had passed a final decree, no difficulty would arise as to the valuation of the appeal therefrom. On the whole, taking the words of the section as they stand, I think that the appellant is allowed the option of placing his own valuation upon the memorandum of appeal in a case like the present, that no intention to the contrary can fairly be inferred from the wording of the section, and that, in a case like the one now before me, it is by no means unreasonable that a defendant, who has all along been contending that he is being made the victim of a wholly extravagant claim, should be permitted to bring his appeal against the preliminary decree before this Court without being penalized in court fees by reason of the heavy valuation put upon his claim by the plaintiff. In the case to which I have already referred, which was decided by a learned Judge of this Court, it was assumed that the appellant would be permitted to put his own valuation upon his memorandum of appeal in a case like the present. I have now expressly examined the question and I am of opinion that the point was rightly assumed by my learned predecessor in favour of the appellant. This is my decision upon the question referred to

Before Mr Justice Walsh and Mr. Justice Stuart.

GAJADHAR (APPLICANT) v MEGHA AND ANOTHER (OPPOSITE PARTIES).*

1922 *March*, 28.

Act No. XIX of 1841 *(Succession (Property Protection) Act), section* 18—*Appeal.*

No appeal will lie from the decision of a District Judge in a summary suit under Act No. XIX of 1841.

THE facts of the case material for the purposes of this report are as follows :—

One Gaya died leaving a widow. On her death the respondent, Megha, came into possession of her property, valued at several thousands of rupees The appellant, Gajadhar, who claimed to be the nearest reversioner, applied to the District Judge under Act No. XIX of 1841 [The Succession (Property Protection) Act] for the appointment of a curator. The Judge issued notice to Megha, but ultimately dismissed the application on account of the delay on the part of Gajadhar to produce his evidence.

Gajadhar appealed.

Pandit *K. N. Laghate*, for the appellant.

Munshi *Shiva Prasad Sinha* (with him Munshi *Jang Bahadur Lal*), for the respondents.

WALSH and STUART, JJ. :—The learned counsel for the respondents takes a preliminary objection that no appeal lies under the provisions of section 18 of Act XIX of 1841. This objection must prevail. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr Justice Ryves and Mr Justice Gokul Prasad.

NARAIN RAO KALIA AND OTHERS (DEFENDANTS) v MANNI KUNWAR (PLAINTIFF) †

1922 *March*, 28

Act No. IX of 1908 *(Indian Limitation Act), section* 19—*Acknowledgment of liability—Mukhtar-a'am—Authority of mukhtar-a'am to acknowledge liability on behalf of principal.*

It cannot be assumed that a mukhtar-a'am has power to acknowledge liability within the meaning of section 19 of the Indian Limitation Act; but

* First Appeal No 201 of 1921, from an order of B. J. Dalal, District Judge of Allahabad, dated the 16th of November, 1921.

† Second Appeal No 1150 of 1919, from a decree of Kameshwar Nath, Officiating District Judge of Ghazipur, dated the 28th of October, 1918, reversing a decree of Sudershan Dayal, Additional Subordinate Judge of Ghazipur, dated the 9th of July, 1917.

such a liability can only be fastened upon the principal by a person duly authorized in this behalf, that is, who has been given authority to make such an acknowledgment of liability *Bibi Maharani* v. *The Collector of Etawah* (1) and *Gokal Singh* v *Saheb Singh* (2) referred to.

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NARAIN RAO KALIA v. MASNI KUNWAR.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Sital Prasad Ghosh* and Pandit *K. N. Laghate*, for the appellants

Munshi *Gulzari Lal* and Munshi *Haribans Sahai*, for the respondent.

RYVES and GOKUL PRASAD, JJ.:—This is a defendant's appeal arising out of a suit for a declaration of title as mortgagor by the plaintiff. The defendants, who are now recorded as zamindars, sued to eject the plaintiff, Lalji Singh, from a certain holding under section 58 of the Tenancy Act. The plaintiff, Lalji Singh, pleaded in defence that he was the real owner of the said holding, that the possession of the defendants was merely that of mortgagees on his behalf and that they had, therefore, no right to bring a suit for his ejectment. On the 3rd of February, 1916, the Revenue Court referred him to the Civil Court to have his title declared, and hence he brought the present suit. The plaintiff's allegation was that the defendants were purchasers of mortgagee rights and that they had acknowledged the mortgage in the beginning of the settlement of 1882. The defendants pleaded in reply that the suit was barred by the six years' rule of limitation; that the mortgage was made by the plaintiff's predecessor in title on the 27th of March, 1819, to Gur Dayal; that Gur Dayal transferred his rights to one Ram Kumar Mahant by two deeds of the 19th of August, 1868, and the 1st of September, 1869; that the defendants' predecessor in title purchased these rights at auction on the 21st of November, 1874; that in the meanwhile, on the 20th of March, 1854, the Maharaja of Benares had purchased the rights of some of the mortgagors; that on the 22nd of May, 1865, the Maharaja of Benares had taken an agreement from the remaining mortgagors, that is, those whose rights were not purchased, enabling him to bring a suit to redeem the mortgage, promising in

(1) (1894) I. L. R., 17 A., 198. (2) (1916) 15 A. L. J., 121.

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exchange some rights to the remaining mortgagors; that on the 10th of June, 1885, the Maharaja of Benares brought a suit for redemption and to this suit the present plaintiff, Lalji Singh, was made a defendant; that in the written statement Lalji Singh and others said that they had relinquished all their rights in favour of the plaintiff, Maharaja of Benares, and had been unnecessarily impleaded; that this suit was dismissed by the first court, but the High Court remanded it and it was decreed after remand, that the Maharaja was given time to deposit the mortgage money, but he failed to deposit it in time, and hence the suit formally stood dismissed and the Maharaja's right of redemption disappeared; that on the 6th of March, 1896, the mortgagees applied for mutation of names and succeeded, and the plaintiff's name was removed from the column of owners and entered in the column of tenants; that in the year 1909, the mortgagees sued the plaintiff for enhancement of rent; that Lalji Singh, the present plaintiff, then set up a defence that he was not a tenant but a mortgagor; that this defence was repelled and on the 29th of April, 1910, rent was enhanced; that in the year 1913, Lalji Singh, plaintiff, sued the contesting defendants for redemption of a mortgage of Rs. 100, which was a different mortgage, but the suit was dismissed and the dismissal was ultimately confirmed by the High Court on the 14th of July, 1915; and that now the plaintiff brought the present suit, which did not lie. On these pleadings the parties went to trial. The first court came to the conclusion that this suit, which had been brought within three months of the order of the Revenue Court passed under section 199, clause (*a*), of the Tenancy Act, was within time; but it held that the plaintiff had failed to prove specifically the mortgage, and, therefore, was not entitled to a declaration. On these findings it dismissed the plaintiff's suit. The plaintiff went up in appeal, and the learned Judge of the lower appellate court came to the conclusion that the verification of the wajib-ul-arz of 1882 by the *mukhtar-a'am* of the defendants mortgagees amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act, and that the suit was within time, and in the result he gave the plaintiff the declaration he wanted. The defendants come here

in second appeal. The first plea taken by their learned advocate is that there was no subsisting mortgage for which the plaintiff could be granted a declaration. The next contention raised on behalf of the appellants was that the plaintiff had lost his equity of redemption by virtue of the agreement into which he entered with the Maharaja of Benares in 1885, and it was also contended in the alternative that as the plaintiff had already transferred his rights in the equity of redemption to the Maharaja of Benares, even if a separate suit could lie for redemption, the suit of the Maharaja of Benares having failed, Lalji Singh could not bring such a suit until he had got back by conveyance from the Maharaja of Benares the right which had been transferred to him by the agreement of 1885. On the last occasion when the appeal came on for hearing before us we referred the following issue of fact to the court below: "Whether Lalji Singh, the present plaintiff, respondent, had at the date of the suit any rights left in the equity of redemption." The learned Judge of the court below found that there was no acknowledgment in the settlement of 1882, as it was not shown that the *mukhtar-a'am* of the mortgagees who verified the wajib-ul-arz was duly authorized to acknowledge the liability within the meaning of section 19 of the Indian Limitation Act. He also found that whatever right Lalji Singh had in the equity of redemption, it was not lost because of the transfer of 1885. We agree with the first finding that it cannot be assumed that a *mukhtar-a'am* has power to acknowledge liability within the meaning of section 19 of the Indian Limitation Act, but that such a liability can only be fastened upon the principal by a person duly authorized in this behalf, that is, who has been given authority to make such an acknowledgment of liability. In this connection, see the Privy Council decision in *Beti Maharani* v. *The Collector of Etawah* (1) and *Gokul Singh* v. *Saheb Singh* (2). In this case there is nothing to show that the *mukhtar-a'am* who verified the wajib-ul-arz in 1882 was authorized to admit the liability of the mortgagees to the mortgagors. On this finding of the lower appellate court this appeal must succeed. We allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts.

Appeal allowed.

(1) (1894) I. L. R., 17 All., 198. (2) (1880) I. L. R., 1 All., 121.

REVISIONAL CRIMINAL.

1922
March, 30.

Before Mr. Justice Lindsay

EMPEROR v. DURGA PRASAD*

Criminal Procedure Code, sections 202 and 203—Case partially inquired into—Subsequent order directing a local investigation—Results of investigation taken into consideration against the accused.

Under section 202 of the Code of Criminal Procedure a Magistrate may either inquire into the case himself or may direct a local investigation, but he cannot combine the two procedures. If a Magistrate, having partially inquired into a case, then directs a local investigation, he commits an irregularity. And if he suffers his mind to be influenced prejudicially to the accused by the results of such local investigation, his proceedings will be vitiated.

THIS was a reference in a case under sections 342 and 384 of the Indian Penal Code, made by the Sessions Judge of Banda.

The facts out of which the reference arose are fully set forth in the following order of the Sessions Judge:—

"Durga Prasad, teacher, of the village of Mungas, Sahai, a co-sharer and lambardar of the village, and Madho were tried together and convicted of offences punishable under sections 342 and 384 of the Indian Penal Code. Durga Prasad was fined Rs. 50 only; the other two, more than Rs. 50. Sahai and Madho prefer this appeal from the order of conviction and sentence passed against them.

"Having heard the learned vakil for the appellants and the Government Pleader, I have arrived at the conclusion that the convictions and sentences of Sahai and Madho should be set aside and they should be retried by any other Magistrate of the first class.

"Six persons brought the complaint which gave rise to the trial against the accused persons in the lower court on the 4th of October, 1921. The complainants were examined on the same date. Processes for the appearance of the accused persons were not ordered to be issued. The complainants were told instead, under section 202, Criminal Procedure Code, to produce evidence on the 19th of October. Ordinarily, after the examination of the complainant, processes are issued. And, according to decided cases, a Magistrate has no discretion to make a judicial inquiry, unless he is not satisfied as to the truth of the complaint. The

*Criminal Reference No. 153 of 1922.

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above order is, therefore, *primâ facie* proof of the fact that the learned Magistrate was not satisfied as to the truth of the complaint, even after hearing the statements of the complainants on oath. On the 19th, the evidence of two witnesses, Gajju and Bharosa, was recorded. Having heard them, the learned Magistrate wrote the following order, which is to be found in the order-sheet :—

'I am not satisfied with the section 202 evidence produced today. It is admitted that the complainants had stipulated to plough up the fields and, therefore, the subsequent alleged extortion may not have any truth in it.'

"If the reasons given by the learned Magistrate were valid, the proper order in the ordinary course of things ought to have been a dismissal of the complaint under section 203, with brief reasons for such dismissal. Instead of that, the learned Magistrate proceeded to make an order directing a naib-tahsildar "*to report after an inquiry.*" The meaning of this order is not quite clear. Under section 202 an "*inquiry*" into the case is the province of the Magistrate only. Any officer subordinate to such Magistrate, or a police officer, or any other person may, if so directed, hold a previous "*local investigation.*" In a case decided by the Hon'ble High Court, *Baij Nath* v. *Raja Ram* (1), the suggestion was thrown out that cases, in which there were any disputes about boundary, or any matter of that kind was involved, were alone fit cases for a "*local investigation.*" But I presume that the learned Magistrate's order directing the Naib-Tahsildar to hold "*an inquiry and report,*" was really an order directing an investigation authorized by section 202. The Naib-Tahsildar examined a number of witnesses on the spot besides the complainants, the accused and the two witnesses whom the complainants produced before the learned Magistrate under section 202. After a perusal of the Naib-Tahsildar's proceedings and the report, on the 3rd of November, 1921, processes were issued for the appearance of the accused persons, who appeared on the 18th of November. On this date two out of the six complainants, two witnesses, who were examined under section 202, and one further witness Manzur Nabi, who proved not a word of the charge,

(1) (1913) 10 A. L. J., 79.

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were examined. The court then adjourned, and on the 3rd of December, 1921, the Naib-Tahsildar and one Ram Prasad, an assistant teacher in the school of one of the accused, Durga Prasad, were examined. I notice that the counsel for defence objected to any question being put to the Naib-Tahsildar relating to what the accused persons or the witnesses stated to him. This objection was over-ruled. On the other hand, the prosecution wanted the Naib-Tahsildar to prove the statements of persons recorded by him. That was also disallowed. The Naib-Tahsildar proved (1) that Sahai, one of the accused persons, saluted the witness in a manner which led him to think that he wanted the matter to be hushed up; and (2) that the assistant teacher, Ram Prasad, told him that one of the boys, who had been produced before the witness, was tutored by one of the accused. The evidence of the assistant teacher, Ram Prasad, before the court did not help the prosecution. The latter thereupon declared the witness hostile, and was permitted to cross-examine him. The record indicates that to this witness was put in cross-examination a statement said to have been made by him before the Naib-Tahsildar, where he mentioned that the accused, Durga Prasad, realized Rs. 10 each from the complainants. He was apparently contradicted by his statement before the Naib-Tahsildar, for he goes on to say that the Naib-Tahsildar did not record his full statement, that he made notes only, that his statement was not shown or read out to him, and that he signed it merely because he was desired by the Naib-Tahsildar to do so.

"The learned Magistrate in his judgment observes as follows:—

'Manzur Nabi, witness, gives clue to the first *panchayat* having been held in the school, although he denied all knowledge of the second. (I may note here that no offence was committed in the first *panchayat*, and the offences which are the subject of the charge were said to have been committed in the second *panchayat* alone). Pandit Suraj Nath Misra, the Naib-Tahsildar who held the preliminary investigation, has also been formally examined. Ram Prasad, assistant teacher, has retracted the statement made by him before the Naib-Tahsildar, obviously under pressure.'

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"The learned Magistrate bases his judgment in the above circumstances on the evidence of the two complainants and the two witnesses, the same who were examined under section 202, alone. A comparison of their evidence under section 202, and at the time of the trial, will show that there was nothing new in their subsequent statements; but so far as their testimony went, the case stood exactly where it did after the proceedings under section 202.

"Now, under section 202 the learned Magistrate had the option of only one out of two alternatives, namely, either to inquire into the case himself, or direct a previous local investigation. Assuming that this was a fit case for a local investigation, there is nothing in section 202 which empowered the learned Magistrate to have recourse to both the alternatives. The record shows that he chose one of the two alternatives, namely, to inquire into the case himself, which he did. His order, therefore, directing a local investigation was irregular. And if it be found that any material obtained through this irregular course acted on the mind of the learned Magistrate in arriving at a conclusion prejudicial to the accused persons, it must be held that the accused persons were prejudiced in consequence of that irregularity. It would, therefore, vitiate the proceedings. Upon a perusal of the judgment under appeal and the passages quoted, I have scarcely any doubt that a material portion of the irregular proceedings had a share in the formation of the learned Magistrate's judgment. I would accordingly set aside the order of conviction and sentence made against the appellants and send down the record to the District Magistrate to pass it on to some other Magistrate empowered to try the case, for re-trial of the appellants. In view of the ruling in *Bhola* v. *Emperor* (1), I refer the case of Durga Prasad, against whom a *non-appealable sentence* was passed and who has not appealed, to the Hon'ble High Court after taking the learned Magistrate's explanation."

LINDSAY, J.—For the reasons stated in the referring order of the Sessions Judge, I set aside the conviction and sentence of the accused, Durga Prasad, and direct that he be re-tried before a competent Magistrate along with the two other accused,

(1) (1917) 40 Indian Cases, 832.

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namely, Sahai and Madho, in whose case a re-trial has been directed by the learned Sessions Judge.

Reference accepted.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

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March, 31.

PACHKAURI LAL AND ANOTHER (DEFENDANTS) *v.* MUL CHAND AND ANOTHER (PLAINTIFFS)*

Act No. XXVI of 1881 *(Negotiable Instruments Act), sections* 64 *and* 76—Hundi *drawn by drawer on himself—Presentation for payment not necessary.*

The fact that the drawer and the drawee of a *hundi* are the same person will not make the *hundi* a promissory note; but in such case no presentation on due date is necessary, as from the nature of the case the drawer cannot suffer damage from the want of such presentation.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal* and Dr. *Surendra Nath Sen*, for the appellants.

Dr. *S. M. Sulaiman*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—This appeal arises out of a *hundi* drawn by Bihari Lal Balmakund on the firm of Bihari Lal Balmakund in favour of Mul Chand, the plaintiffs agreeing to pay him Rs. 2,000 within ninety days from the 30th of April, 1918, with interest at 12 per cent. per annum. The plaintiffs gave the defendants credit for certain items and sued for Rs. 1,906, the balance with interest.

The main defence of the contesting defendants was the denial of the execution of the *hundi*. Alternatively, it was claimed that execution by one member of the firm would not bind the other members, as the money was not required for or used in the business of the firm.

The trial court decreed the suit. On appeal a further point was taken, namely, that as the *hundi* had not been presented, the provisions of section 64 of the Negotiable Instruments Act

* Second Appeal No 1089 of 1920, from a decree of L. S. White, District Judge of Cawnpore, dated the 1st of July, 1920, confirming a decree of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 21st of November, 1919.

barred the suit. The other pleas raised in the trial court were reiterated. On this new point the court below held that this particular *hundi* was really a promissory note and, therefore, did not fall within section 64 of the Negotiable Instruments Act. In this view we are unable to agree; but it seems to us that the provisions of section 76, clause (*d*), render presentation unnecessary in this case. According to that section no presentation for payment is necessary "as against the drawer, if the drawer could not suffer damage from the want of such presentation". In this case the drawer and the drawee were the same, and, therefore, both of them knew when the *hundi* was executed that it was payable ninety days thereafter, and on the expiration of the ninety days, both of them knew that it had not been paid. Thus, no question of damage can arise and the cases cited are, therefore, not applicable.

There remains another point, however, which has not been decided, and that is whether, when Bihari Lal executed this *hundi*, he was acting for the firm, and whether the money was required for the business of the firm. On this point there is no clear finding by the District Judge. We, therefore, refer an issue to the learned District Judge, namely, did Bihari Lal borrow this Rs. 2,000 for the business of the firm Bihari Lal Balmakund? No further evidence will be taken. On return of the finding the usual ten days will be allowed for objections.

Issue remitted.

Before Mr. Justice Walsh and Mr. Justice Ryves.

BRIJ LAL AND OTHERS (DECREE-HOLDERS) *v.* DAMODAR DAS (OBJECTOR)* *Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 183—*Civil Procedure Code* (1908), *section* 144—*Application for restitution—Limitation.* 1922 *April*, 9.

Held that an application under section 144 of the Code of Civil Procedure to recover mesne profits which became payable to the applicant in consequence of a decree of the High Court having been reversed by the Privy Council, though not a proceeding in execution, yet, being an application to enforce a decree of His Majesty in Council, was governed as to limitation by article 183 of the first schedule to the Indian Limitation Act, 1908. *Madhusudan Das* v. *Birj Lal* (1) referred to. *Jwala Ram* v. *Nand Ram* (2) followed.

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*First Appeal No 84 of 1921, from a decree of Proo Nath Ghose, Subordinate Judge of Bareilly, dated the 16th of November, 1920.

(1) (1921) 61 Indian Cases, 800. (2) (1922) Supra, p. 407.

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THE facts of the case material to this report are these :—Het Ram and others brought a suit for possession of certain zamindari property in the court of the Subordinate Judge of Bareilly. The suit was dismissed. The plaintiffs then assigned a portion of their rights to one Damodar Das on the latter undertaking to finance the litigation, and preferred an appeal to the High Court, which decreed the claim. The plaintiffs executed the decree and, having obtained possession of the property in suit, put Damodar Das in possession thereof. On appeal by the principal defendant, Brij Lal, the Privy Council by their judgment, dated the 6th of February, 1914, dismissed the suit and ordered the parties to bear their own costs. Brij Lal, without waiting for a sealed copy of the order of their Lordships of the Privy Council, made an application, purporting to be under section 144 of the Code of Civil Procedure, to the court of the Subordinate Judge of Bareilly for restoration of possession of the property to himself, and filed along with it a copy of the judgment of the Privy Council which he had received from his solicitors. The judgment-debtors objected, *inter alia*, that the applicant had not fulfilled the requirements of order XLV, rule 15, of the Code of Civil Procedure and that no order for execution could be passed in the absence of a formal copy of the order of His Majesty in Council. The objections did not find favour with the Subordinate Judge and were disallowed. On appeal the High Court gave effect to the objections and dismissed Brij Lal's application. [Vide *Damodar Das* v. *Brij Lal* (1)]

In the meantime a formal copy of the order of His Majesty in Council having been received and transmitted to the court of the Subordinate Judge under order XLV, rule 15, of the Code of Civil Procedure, Brij Lal applied again to the Subordinate Judge and obtained possession of the property from Damodar Das. Brij Lal next applied on the 10th of September, 1916, for the refund of costs which had been realized from him by Het Ram and others after their appeal to the High Court had been decreed. The application was opposed and the matter went up to the High Court, with the result that the costs were ordered to be refunded. Brij Lal then made a third application on the

(1) (1915) I. L. R., 37 All., 567.

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4th of September, 1918, out of which this appeal arose, for restitution of mesne profits realized by Damodar Das under the decree of the High Court. Damodar Das opposed the application on the following grounds :—

(1) That the application having been made after more than three years from the date of the decree of His Majesty in Council, it was barred by time under article 183 of the Limitation Act.

(2) That the decree-holder not having asked for mesne profits in the previous applications, the present application was barred by the provisions of order II, rule 2, of the Code of Civil Procedure.

(3) That the objector, not having been made a party to the appeal to His Majesty in Council, was not liable to the applicant for mesne profits.

The learned Subordinate Judge decided all the three points in favour of Damodar Das and dismissed the application. Brij Lal came up in appeal to the High Court.

Dr. *Kailas Nath Katju*, for the appellant :—

The present application, being one to enforce an order of His Majesty in Council, is governed by article 183 of the Limitation Act which prescribes a period of twelve years from the time when the right to enforce such order accrues. Enforcement of an order may be by way of restitution, and the fact that this is an application under section 144 of the Code of Civil Procedure does not take the matter out of the purview of that article. The decree-holder by means of this application is only seeking to enforce what follows as a necessary consequence from the order of His Majesty in Council : *Madhusudan Das* v. *Birj Lal* (1). For the purposes of this application it is immaterial whether an application for restitution made under section 144 of the Code of Civil Procedure is an application for execution or not. The Bombay High Court and the Madras High Court have consistently held that such an application is one for execution : *Kurgodigouda* v. *Ningangouda* (2), *Sayad Hamdalli* v. *Ahmedalli* (3), *Unnamalai Ammal* v. *Mathan* (4) and *Somasundaram Pillai* v. *Chokkalingam Pillai* (5).

(1) (1921) 61 Indian Cases, 306
(2) (1917) I. L. R., 41 Bom., 325
(3) (1921) I. L. R., 45 Bom., 1187
(4) (1917) 33 M. L. J., 413
(5) (1916) I. L. R., 40 Mad., 780.

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A Division Bench of this Court has recently held in *Jiwa Ram* v. *Nand Ram* (1) that proceedings under section 144 of the Code are not execution proceedings, but the question of limitation was not considered.

As to the second objection, the provisions of order II, rule 2, of the Code are not applicable to such a case and the present application is maintainable.

The third objection has also no force. Damodar Das being an assignee *pendente lite* is bound by the decree of His Majesty in Council and is liable to pay mesne profits. Under section 52 of the Transfer of Property Act the rights of my client cannot be affected by any transfer made during the active progress of the suit. Section 146 of the Code of Civil Procedure also gives recognition to the same principle: *Dorasami Ayyar* v. *Annasami Ayyar* (2). Moreover, in view of the decisions on the previous applications for restitution between the parties, it is not open to Damodar Das now to say that the decree-holder is not entitled to recover mesne profits from him.

Munshi *Durga Prasad* (for Mr. *B. E. O'Conor*), for the respondent:

Under section 583 of the Code of Civil Procedure of 1882 proceedings for obtaining restitution were proceedings in execution of decree; but section 144 of the present Code is a new section, and the language used in this section makes it clear that proceedings under it are not proceedings in execution, and, therefore, the only article applicable is the general article 181. In execution something positive is required to be done, while in restitution no part of the order or decree is carried out and no specific relief granted by it is sought to be executed. Articles 182 and 183 govern cases of execution only and the expression "to enforce" used in article 183 is much narrower than the word "execution" used in article 182. We have to look to the character of the application, and the present application being one under section 144 of the present Code and having been made more than three years after the date of the Privy Council

(1) (1922) Supra, p. 407.

(2) (1899) I. L. R., 23 Mad., 306.

decree, is barred by time under article 181: *Jiwa Ram* v. *Nand Ram* (1), *Asha Bibi* v. *Nuruddin* (2), and *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (3).

There was no order as to mesne profits passed by the Privy Council and what the decree-holder is now seeking is not the enforcement of any specific order of His Majesty in Council. The present application, therefore, does not fall under article 183.

Proceedings under section 144 of the Code of Civil Procedure are proceedings in the suit and the provisions of order II, rule 2, of the Code are applicable. The relief now sought, not having been asked for in the previous applications, cannot be granted.

As for the last point, Brij Lal was fully aware when he appealed to the Privy Council that the plaintiffs, Het Ram and others, had transferred some of their rights to Damodar Das and had also put him in possession of the property, and even then he did not make him a party to the appeal. Under these circumstances Damodar Das is neither bound by the Privy Council decree nor can restitution be claimed against him by the decree-holder.

Dr. *Kailas Nath Katju* replied.

WALSH, J.:—This appeal raises two points. It was an application in the court below against a person who had become a transferee of a decree which was subsequently set aside in the Privy Council in favour of the present appellants. The transferee was not a party to the proceeding in the Privy Council, but under the decree which the Privy Council set aside and of which he had become a transferee, he obtained possession of certain property and was, therefore, in the enjoyment of mesne profits in respect of it. The application to the court below, which was in substance a proceeding under section 144, but which adopted all the forms applicable to execution proceedings, asked that the respondent should account for mesne profits during the time for which he had been unlawfully in possession under a decree which had been set aside. The application was dismissed by the court below on the ground that it was time-barred by article 181

(1) (1922) Supra, p. 407. (2) (1915) 30 Indian Cases, 660.

(3) (1917) 2 Pat. L. J., 367.

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in any case it could not be based on the report of the Privy Council. It was pointed out that under order XLV, rule 15, it was necessary to apply first of all to the High Court to transmit the decree of the Privy Council before its execution could be taken out. The Subordinate Judge over-ruled this objection. On appeal this Court upheld it. The judgment is reported in *Damodar Das* v. *Birj Lal* (1), and I will refer to it later. There were two further applications made to the Subordinate Judge, one for recovery of possession and the other for costs. Both of these were made within three years of the decree of the Privy Council, that is, the 9th of February, 1914. The present application was filed on the 4th of September, 1918, for mesne profits for the period during which the appellants had been kept out of possession of the property. The lower court rejected the application on three grounds. Firstly, that it was barred by article 181 of the schedule to the Limitation Act, on the ground that an application for restitution was not an application in execution of a decree, and, therefore, article 182 did not apply. It also held that article 183 was not applicable, because it was not an application to enforce *in terms* the decree of the Privy Council. It, therefore, held that the only other article possible was article 181 and that under that article the application was barred by time. It also held that, inasmuch as the respondents were no party to the appeal in the Privy Council, they were not bound by that decree. Thirdly, it applied order II, rule 2, as barring the application. On this ground also it dismissed the application. On appeal before us all the three points have been attacked. The third point has not been pressed. On the second point I think it is sufficient to say that in previous proceedings for restitution and costs in this very litigation arising out of this decree and in connection with the same property, it has been finally held by this Court that the respondents, though no party to the appeal, are bound by the decree. They, therefore, in my opinion, cannot raise that objection again. On the first point I feel considerable difficulty. It has now been held by this Court in the case of *Jiwa Ram* v. *Nand Ram* (2) that an application under section 144 of the Code

(1) (1915) I.L.R., 37 All., 567 (2) (1922) Supra p. 407.

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is not a proceeding in execution under the Code of Civil Procedure. It is unnecessary, I think, to refer to any other rulings of other courts. The question, however, remains as to what, assuming that it is not an application for execution, is the article of limitation which would apply. It has been held in the cases of *Ram Singh* v. *Sham Parshad* (1), *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (2) and *Asha Bibi* v. *Nuruddin* (3) from Burma, that applications under section 144 come within the purview of article 181 of the Limitation Act. On the other hand, the Bombay High Court in the case of *Sayad Hamidulli* v. *Ahmedulli* (4) and the Madras High Court in the case of *Unnamalai Ammal* v. *Muthan* (5) have held that applications under section 144 fall within article 182 of the Limitation Act. I may point out that all these cases refer to applications under section 144 from decrees of the High Court and that, therefore, article 183 was not and could not have been considered. It has been argued that in the case already mentioned, *Damodar Das* v. *Birj Lal* (6), this Court has really decided the matter and held that an application of this kind is really a proceeding in execution. In my opinion, however, in order to appreciate that decision it is necessary to examine what were the actual facts before the Court. There an attempt had been made to execute the decree of the Privy Council in the court of the Subordinate Judge on the basis of a copy of their printed judgment only, and without having adopted the procedure laid down in order XLV, rule 15. This Court held that order XLV, rule 15, provides that whosoever desires to obtain execution of any order of His Majesty in Council must first apply under that particular order before he can proceed further, and it goes on to say that the word "execution" in that order is intended to cover execution of any kind, because, as they point out, but for the presence of order XLV, rule 15, there would be nothing to show what steps should be taken to execute a decree, or to give effect to a decree of His Majesty in Council.

(1) (1918) P. R., p. 224.
(2) (1917) 3 Pat. L. J., 367.
(3) (1915) 30 Indian Cases, 680.
(4) (1920) I. L. R., 45 Bom., 1137
(5) (1917) 33 M. L. J., 413.
(6) (1915) I.L.R., 37 All., 567.

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In my opinion that case takes us no further. The only case to which we have been referred in which a Privy Council decree has been the subject of decision, is Execution First Appeal No. 93 of 1920, decided by a single Judge of this Court, on the 7th of May, 1921, which has been reported in 61, Indian Cases, 806. There, although it appears from the report that Damodar Das was a party, he is not the same individual as is the respondent here. That case is not in any way *res judicata*, but it is a decision among other parties to the same litigation and gives effect to the same decree of the Privy Council. It was an application to recover certain costs, and although the order of the Privy Council as to costs was that there should be no order as to costs, this had the effect of reversing the order of the High Court which had given the respondent in that case costs, which he had recovered. Mr. Justice STUART held that the only authority for the recovery of costs which Brij Lal paid to Musammat Indar Kuar was the order of His Majesty in Council. He held, therefore, that although that application was under section 144 of the Code, nevertheless the period of limitation applicable was that provided by article 183. The language of article 183 is different from that of article 182. Article 182 provides for "the execution" of a decree or order of any Civil Court. Article 183 is "to enforce" a judgment, decree or order . . . of His Majesty in Council. It seems to me that the words "to enforce" there are wider in meaning than the words "to execute" in article 182 and should be interpreted as equivalent to "to give full effect to", which is synonymous with "to enforce." In my opinion, therefore, the order of Mr. Justice STUART was right and we should follow it. I would, therefore, allow the appeal.

BY THE COURT:—The order of the Court is that the appeal must be allowed and the case restored to the lower court to deal with on the merits. The appellants will have the costs of this appeal. Costs in the court below will abide the result.

Appeal allowed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

LYALLPUR SUGAR MILLS CO., LD. AND ANOTHER (DEFENDANTS) *v.* RAM CHANDRA GUR SAHAI COTTON MILLS CO., LD. (PLAINTIFFS).* 1922 *April, 5.*

Civil Procedure Code (1908), order XI, rules 14, 18 and 21—Order on defendant for production of documents—Order not complied with—Defence struck out.

Non-compliance with an order served on a defendant for the production only of documents under rule 14 of order XI of the code of Civil Procedure does not warrant the striking out of the defence. It is only in cases of the refusal to answer interrogatories, the refusal to make discovery of documents, or the refusal to permit inspection of documents that a trial court is justified in striking off the defence of a defendant or in dismissing the suit of a plaintiff.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Mr. *B. E. O'Conor*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—There are three connected appeals before us today pending between the same parties, namely, Nos. 319 and 186 of 1919 and one other appeal from order which has been admitted by us today but which has not been numbered by the office. This last appeal which we have admitted and No. 186 of 1919 are appeals from orders. The appeal No. 319 of 1919 is a regular first appeal from an *ex parte* decree.

The facts which have given rise to the three appeals are as follows:—The parties to the three appeals are the Ramchandra Gur Sahai Cotton Mills Co., Ltd., as plaintiffs, and the Lyallpur Sugar Mills Co., Ltd., through their manager, L. Jai Ram Das, and the Cotton Ginning Factory at Lyallpur through their proprietors L. Mathura Das and Thakur Das, as defendants.

The plaintiff company sued for the recovery of Rs. 32,759-8 as damages, on the allegation that the defendants had promised to supply the plaintiff firm with 320 bales of Lyallpur cotton at Rs. 45-8 per maund, to be delivered at Lucknow in the months of November and December, 1917 and in the month of January, 1918. The contract was entered into at Cawnpore on the 14th of November, 1917. The defendant failed to deliver the goods at

*First Appeal No. 135 of 1919 from an order of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 2nd of August, 1919.

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the specified time. The plaintiff firm had to go into the market and purchase the bales of cotton that were required, and as in the meantime the price of the bales of cotton had gone up, the plaintiff firm suffered a loss of Rs. 32,759-8.

The suit out of which these appeals have arisen was instituted in the court of the Additional Subordinate Judge of Cawnpore, on the 12th of August, 1918, presumably because the contract was entered into at Cawnpore and because Jai Ram Das, defendant No. 1, lives at Cawnpore and carries on his business there. Jai Ram Das purchases sugar from Messrs Begg Sutherland & Co., Cawnpore, and carries on the business of selling sugar at Lyallpur. Thakur Das and Mathura Das admittedly live at Lyallpur, where they have got a cotton ginning factory. The suit was resisted on various grounds. The issues were fixed by the learned Additional Subordinate Judge on the 23rd of October, 1918. On the 23rd of November, 1918, the plaintiff firm made an application purporting to be under order XI, rule 14. By the said application the plaintiff firm asked the court to require the defendants to produce in court certain books and other documents which were detailed in the application. On the 29th of November, 1918, the learned Subordinate Judge made an order to the effect that notice should be issued. On the 13th of January, 1919, a notice on the said application was issued and was served upon the pleader for the defendants. The notice was in the form No. 6, given in appendix C to the Code of Civil Procedure. As the notice was not complied with, a second application was made on behalf of the plaintiff firm on the 4th of April, 1919. The pleader for the defendant No. 1 stated to the court that the papers called for by the court would be produced if all or any of them were found in the possession of Jai Ram Das. No papers seem to have been filed. On the 24th of April, 1919, a third application was made on behalf of the plaintiff firm to the same effect. A notice was issued, which was affixed to the gate of the house of Jai Ram Das, as the latter was not found at home. This application also proved infructuous. On the 2nd of June, 1919, a fourth application was made on behalf of the plaintiff firm to the same effect. The learned Subordinate Judge allowed the defendant No. 1 ten days

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within which to produce the documents called for. The order was not complied with. On the 25th of July, 1919, the plaintiff filed an application purporting to be under order XI, rule 15. The learned Subordinate Judge directed that notice should issue. The notice was served upon the pleader for defendant No. 1 on the 4th of August, 1919. The case came up for hearing on the 12th of August, 1919, and the plaintiff firm applied to the court for an order striking off the defence of the two defendants. The learned Subordinate Judge put off the case to the 15th of August, 1919, directing the production of the books and the documents called for from Jai Ram Das. On the 15th of August, 1919, Jai Ram Das filed an application stating that he had the books with him in court and implying that he had brought them also into court before, but stating that none of the books or documents was in any way relevant to the dispute between him and the plaintiff firm. He, however, offered to make over the books to the court and allow their inspection. This offer was not accepted by the plaintiff firm, which insisted upon its prayer to the court to strike off the defence, and the learned Subordinate Judge acceded to the request of the plaintiff firm.

So far we have recited the facts that led to the striking off of the defence of Jai Ram Das. The facts relating to the striking off of the defence of Mathura Das and Thakur Das are somewhat different. On the 24th of April, 1919, interrogatories were filed on behalf of the plaintiff with a request that they should be served upon Mathura Das and Jai Ram Das for replies. The interrogatories for Mathura Das were served upon his pleader. Jai Ram Das made replies to the interrogatories that were served upon him and they were filed on the 23rd of May, 1919. No replies were received from Mathura Das. The plaintiff firm again applied to the court to compel Mathura Das to file answers to the interrogatories. The pleader for Mathura Das stated that there was martial law at Lyallpur and he could not get into touch with his client. On the 17th of June, 1919, the learned Subordinate Judge made an order that the replies to the interrogatories should be filed in court within ten days after the termination of the martial law at Lyallpur. On the

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28th of July, 1919, no replies having been received, the plaintiff firm asked the trial court to strike off the defence of Mathura Das. The pleader who was appearing for him stated that though martial law had been withdrawn, yet the whereabouts of his client were not known. He had made all attempts to get into communication with him but had failed. Thereupon the case was put off to the 12th of August, 1919. On the 12th of August, 1919, the pleader for Mathura Das stated that he had received a wire from his client that he (Mathura Das) was suffering from fever and could not reach Cawnpore in time. The pleader asked for an adjournment, which request was rejected. The defence of Mathura Das was thereupon struck off on the 12th of August, 1919. In respect of the application against Jai Ram Das, referred to above, the learned Subordinate Judge, according to the learned counsel for Jai Ram Das who appears before us, made an oral order on the 13th of August, 1919, striking off the defence of Jai Ram Das also. The written order was, however, made on the 28th of August, 1919. The statement of the learned counsel for Jai Ram Das that the defence of his client was struck off really on the 15th of August, 1919, is borne out by the fact that the claim of the plaintiff firm was tried on the 16th of August, 1919, *ex parte* The suit was tried on the 16th of August, 1919, and decreed *ex parte* the same day.

Jai Ram Das and Mathura Das have preferred two separate appeals from the orders striking off their defence. The appeal of Jai Ram Das is No. 186 of 1919 and the other appeal is the one that has not yet been numbered. The third appeal, *i. e.*, the one from the *ex parte* decree, No. 319 of 1919, is jointly by Jai Ram Das and Mathura Das. They contend that the orders of the learned Subordinate Judge striking off their defences are invalid in law and, in any case, were passed without the exercise of proper discretion.

We will take up the case of Jai Ram Das first. There is no doubt that several attempts were made by the plaintiff firm to compel Jai Ram Das to produce in court certain documents. All the applications on behalf of the plaintiff firm, except the last one, dated the 28th of July, 1919, were applications under

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order XI, rule 14. They were merely for the production of documents in court. At the first blush it does appear that the conduct of Jai Ram Das was contumacious, but we find that there is evidence on the record to show that as early as the 31st of May, 1919, in answer to the interrogatories served upon him by the plaintiff firm he had stated distinctly that the documents that were called for from him were not in his possession. But if it be conceded for the sake of argument for a moment that Jai Ram Das was guilty of disobedience of the order of the court, was the court justified in striking off his defence? The order of the court to Jai Ram Das to produce the books was an order made under order XI, rule 14. The non-compliance with that order does not warrant the striking off of the defence of the party which is guilty of the non-compliance of the order. The grounds upon which the discretion is given to a trial court for striking off the defence of a defendant are given in rule 21 of order XI of the Code of Civil Procedure. According to the said rule, there are three grounds only upon which a trial court is justified in striking off the defence of a defendant or dismissing the suit of a plaintiff, namely, (1) the refusal to answer interrogatories, (2) the refusal to make discovery of documents, (3) refusal to permit inspection of documents. Now, rule 14 of order XI of the Code of Civil Procedure does not relate either to the answering of interrogatories or the discovery or inspection of documents. The rule relating to discovery is embodied in rule 12 of order XI and the rule relating to the inspection of documents is to be found in rule 13 of the same order. In the present case the learned Subordinate Judge made no order either under rule 12 or rule 13 of order XI of the Code of Civil Procedure. It is, however, contended on behalf of the plaintiff firm that the notice which was issued to Jai Ram Das was one that required inspection of documents called for from him. The form of notice to be issued under order XI, rule 14, is given in Appendix C, form No. 6. The notice that was issued in the present case does not comply with the form given in Appendix C. The said form begins thus:—

"Upon hearing . . . and upon reading the affidavit of . . . filed . . . the day . . . ."

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In the present case no affidavit was filed on behalf of the plaintiff, stating the reasons for which the books were summoned from Jai Ram Das or showing in what manner they were relevant to the dispute between the parties. It is, however, contended that when a set form is given by the Legislature for the issue of notice and that form is complied with, the notice, if not bad, would entail the penalty exacted by the trial court from Jai Ram Das. The argument may be called a technical argument. The obvious reply, a technical one also, is that the notice which we find on the record is not strictly in accordance with form No. 6. As we find that the learned Subordinate Judge had made no order for the inspection of documents, and indeed he could not have made one as the provisions of rule 18 of order XI had not been complied with, the non-compliance with the order to produce books or documents in court did not justify the trial court to strike off the defence of Jai Ram Das.

Now we take up the case of Mathura Das. The interrogatories were served upon his pleader. There is no material on the record to show whether the pleader sent those interrogatories to Mathura Das. It may, however, be said that if they were not sent, that was the fault of the pleader, and the omission by the pleader would in no way affect the right of the plaintiff to demand the court below to enforce the provisions of rule 21, order XI, against Mathura Das. However that may be, it is in evidence that Lyallpur was under martial law up to somewhere in the beginning of July, 1919. Subsequent to the date, the pleader for Mathura Das lost touch with him and could not get into communication with him. On the 12th of August, 1919, before the order for striking off the defence of Mathura Das was made, his pleader requested the court to allow a few days to enable his client to come up to Cawnpore, on the ground that his client had been ill with fever. The statement of the pleader may or may not have been correct, but we think that under the circumstances of the conditions of life in the Punjab at that time, the learned Subordinate Judge would have exercised a wiser discretion in allowing a few days' adjournment to Mathura Das. Moreover, if the case has to go back for the admission of the defence of Jai Ram Das, the trial would be quite incomplete

if the defence of Mathura Das is kept out. We, therefore, allow both the appeals of Jai Ram Das and Mathura Das and set aside the orders of the learned Subordinate Judge, dated the 12th of August and the 28th of August, 1913, respectively, striking off the defence of Jai Ram Das and Mathura Das. The result, therefore, is that we set aside the *ex parte* decree in the connected appeal No. 319 of 1910 and also direct that the case be restored to the file of the court below, defences from Jai Ram Das and Mathura Das received, and the case tried according to law. As to costs, we direct that they should be costs in the cause.

Appeals allowed.

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LYALLPUR SUGAR MILLS CO., LD., v. RAM CHANDRA GUR SAHAI COTTON MILLS CO., LD.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

BASDEO RAI AND ANOTHER (DEFENDANTS) v. JHAGRU RAI (PLAINTIFF.)*

1922 April, 7.

Pre-emption—Pleadings—Suit based on custom dismissed on finding of want of proof—Case of contract set up in appeal—Remand—Form of order.

In a suit for pre-emption based on an alleged custom the court of first instance found that the custom was not proved, and accordingly dismissed the suit. On appeal the plaintiff raised an oral plea that the village papers afforded evidence of a subsisting contract which would support a decree in the plaintiff's favour. With reference to this plea the lower appellate court set aside the decree of the first court and remanded the case for trial on the merits.

Held, that the proper course for the lower appellate court was to remand the case with permission to the plaintiff to amend his plaint, basing his case on the ground of contract, the defendants being allowed to put in their defence to the new plea and to produce evidence, if necessary. *Ram Gharib Tewari* v. *Shankar Tewari* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellants.

The respondent was not represented.

RAFIQ and PIGGOTT, JJ.:—This appeal is from an order of remand made by the lower appellate court under order XLI, rule 23. It appears that Munna Rai executed a deed of sale in favour of Basdeo Rai and Sat Narain Rai in respect of certain immovable

* First Appeal No. 212 of 1921, from an order of Piari Lal Rastogi, Additional Subordinate Judge of Basti, dated the 2nd of June, 1921.

(1) (1921) 20 A. L. J., 15.

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property. Jhagru Rai sued to recover the said property by right of pre-emption. Jhagru alleged in his plaint that a custom of pre-emption obtained in the village in which the property in dispute was situate and that he, being a co-sharer, had a preferential right over the vendees, who were strangers. The court of first instance found that the custom alleged in the plaint had not been proved. The claim was accordingly dismissed. On appeal by the pre-emptor, it was contended on his behalf, though no such ground was taken in the memorandum of appeal, that inasmuch as there was a mention of pre-emption in the *zamima khewat*, the pre-emptor was still entitled to succeed, if not on the ground of custom, at least on the ground of contract. The lower appellate court acceded to the contention and, setting aside the decree, remanded the case for trial on the merits. The vendees in appeal to this Court challenge the order of remand and contend that the lower appellate court should not have accepted the contention of the pre-emptor, and if it did, it should have remanded the case to the court of first instance, directing the amendment of the plaint and the framing of an issue with regard to the alleged contract of pre-emption, and then the case should have been disposed of. In support of his contention the learned counsel for the vendees refers us to the case of *Ram Gharib Tewari* v. *Shankar Tewari* (1). The case relied upon by the appellants before us does bear out the contention for them to a certain extent. In that case the first appellate court had decreed the claim of the pre-emptor, holding that though he had failed to prove the alleged custom of pre-emption yet the wajib-ul-arz could be construed to contain a contract of custom and, as the period of the wajib-ul-arz had not expired, the contract would be considered to be still in force. The facts of the present case are slightly different. In the present case, the lower appellate court has not decreed the claim of the pre-emptor on the basis of contract, but has only remanded the case to the first court for trial on the merits. We, however, think that the contention of the appellants is so far correct that the lower appellate court should not have recorded a finding to the effect that the contract of pre-emption stood proved as between

(1) (1921) 20 A. L. J., 15.

the parties. If the lower appellate court was inclined to think that the paper upon which the plaintiff pre-emptor relied evidenced a contract, and that that contract was still in force at the time that the disputed sale was made and the present suit instituted, the plaintiff pre-emptor should have been allowed to amend his plaint and the case should have been remanded for trial on the amended plaint. We, therefore, allow the appeal and modify the order of the court below to this extent that the case will go back to the first court for trial with permission to the plaintiff pre-emptor to amend his plaint, basing his claim on the ground of contract. The defendants vendees would, of course, be allowed to urge their defence to the new plea and to give evidence if they think it necessary. With this modification the order of the court below is affirmed. As to costs, we think the costs should abide the event.

Order modified.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Pigott

1922
April, 10

PANCHAYATI AKHARA MAHA NIRBANI (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)*

Suit against Secretary of State for India in Council—Cause of action—Plaintiff deprived of goods by erroneous order of Magistrate.

The plaintiff came into court on the following allegations: that he, being in lawful possession as pawnee of certain ornaments, had made over the same to the Court Inspector of Fyzabad, as they were required to be produced in a criminal case. Subsequently, however, the ornaments, instead of being returned to him, were made over by the court of the Pargana Officer at Fyzabad to the original owner, one Pashpat Nath. The plaintiff, therefore, sued the Secretary of State for India in Council for damages.

Held that the plaint disclosed no cause of action against the Secretary of State. *The Secretary of State for India in Council* v. *Sukhdeo* (1) followed.

THE facts of the case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju* and Pandit *Kashi Narain Malaviya*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondent.

* Second Appeal No. 1036 of 1920, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 1st of June, 1920, confirming a decree of Gauri Shankar Tewari, Officiating Subordinate Judge of Allahabad, dated the 19th of December, 1919

(1) (1899) I. L. R., 21 All., 341.

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PANCHAYATI AKHARA MAHA NIRBANI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This was a suit for damages against the Secretary of State for India in Council. The plaintiff firm states that it was lawfully in possession as pawnee of certain ornaments; that it made them over to Gopal Ram, Court Inspector, Fyzabad, upon his stating that the production of the same "was necessary under an order of the Magistrate *in re King-Emperor* v. *Shambhu Dayal and Girdhari Lal* under section 420 of the Indian Penal Code, which was pending in the Criminal Court at Fyzabad." Subsequently, according to the plaint, the ornaments in question were made over to their original owner, one Pashpat Nath, "by the court of the Pargana Officer" at Fyzabad. The criminal case in question had been tried by the court of the Assistant Sessions Judge of Fyzabad, and that was undoubtedly the proper court to pass orders regarding the disposal of property in respect of which the offence or offences set forth in the charge tried by it had been committed. The plaintiff firm very properly applied to the Assistant Sessions Judge for relief and obtained an order from that court directing Pashpat Nath to replace the ornaments in the possession of the court, or else to make good their value. This would of course have satisfied the plaintiff; but it so happened that Pashpat Nath was unable or unwilling to replace the ornaments and that he became insolvent, after only a trifling sum had been realized from him on account of their value. The plaint asserts that "the Criminal Court at Fyzabad showed negligence and slackness in realizing the remaining amount due from Pashpat Nath"; but admits that, once he had been "declared insolvent", nothing more was to be realized from him.

It is clear, therefore, from the plaint that the acts or omissions by which the plaintiff alleges himself to have been damnified were perpetrated by :—

(i) Gopal Ram, Court Inspector, Fyzabad.

(ii) The Court of the Pargana Officer at Fyzabad.

(iii) The Court of the Assistant Sessions Judge at the same place.

(iv) The Criminal Court at Fyzabad, which may or may not be identical with the second or third of the above.

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PANCHAYATI AKHARA MAHA NIRBANI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL

It is nowhere alleged in the plaint how any of these four were acting, under the alleged circumstances, as servant or agent of the Secretary of State for India in Council, or how the said defendant is liable for damage suffered through the act of any one of them. In short, the plaint discloses no cause of action against the Secretary of State for India in Council. The case is very much on all fours with *The Secretary of State for India in Council* v *Sukhdeo* (1); indeed the present plaintiff's position is much weaker than that of the plaintiff Sukhdeo.

The courts below have, however, inquired into the facts of this case. It has been proved that Gopal Ram, Court Inspector, obtained possession of the ornaments under a warrant lawfully, and very properly, issued by a court of competent jurisdiction; the plaintiff has no cause of action on this ground. The return of the ornaments to Pashpat Nath was effected under an order improperly passed by the Magistrate who had committed the criminal case for trial: the proper court, that of the Assistant Sessions Judge, did its best to rectify the mistake. These courts are not the servants or agents of the Secretary of State and he is not liable for damages if they make a mistake.

The suit has rightly been dismissed by both the courts below; we dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay.

1922
April, 13.

GIRWAR LAL v BANSIDHAR AND ANOTHER *

Criminal Procedure Code, section 138—Public nuisance—Some of the jurors refusing to return a verdict at all—Procedure.

Where in the matter of an inquiry into an alleged public nuisance three out of the five jurors appointed under section 138 of the Code of Criminal Procedure refused to return any verdict at all, it was *held* that the Magistrate concerned was not justified in stopping the proceedings entirely, but he should have appointed a fresh jury.

* Criminal Reference No. 168 of 1922.

(1) (1899) I. L. R., 21 All., 341.

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GIRWAR LAL v. BANSIDHAR.

THIS was a reference made by the Sessions Judge of Aligarh in a case of an inquiry under sections 133 and 138 of the Code of Criminal Procedure into an alleged public nuisance. The facts which gave rise to the reference are thus stated in the Judge's order:

"This is an application in revision against an order of Syed Zain-ud-din, Deputy Magistrate, first class, stopping further proceedings under section 139 (2) of the Criminal Procedure Code.

A jury of five were appointed. Two of these wanted the platforms in dispute to be cut down slightly. The other three refused to return a verdict at all. The lower court has interpreted this as meaning that the three men have not found the order under section 133 of the Code of Criminal Procedure to be a reasonable one nor have they agreed to any modification. I am, however, of the opinion that the three men have deliberately shirked their duty as they have not given any verdict at all, probably because they do not want to offend either party. Under the above circumstances, I am of the opinion that there has been a perverse refusal on the part of the three men to decide, and in accordance with the note in paragraph 9 on page 220 of Sohoni's Criminal Procedure Code, 9th Edition, it was competent on the part of the lower court to appoint a fresh jury.

I, therefore, refer the case to the Hon'ble High Court with the recommendation that the order of the lower court stopping further proceedings be set aside and that the lower court be directed to appoint a fresh jury.

The lower court is asked to submit its explanation to me within a week."

LINDSAY, J.:—I have read the order of the learned Sessions Judge and agree with his view of the case. I, therefore, set aside the order of the Magistrate, as recommended by him, and direct that the case be sent back to the Magistrate, who will proceed to appoint a fresh jury and decide the matter under the provisions of section 139 of the Code of Criminal Procedure.

Reference accepted.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

RAM PRASAD KALWAR AND ANOTHER (PLAINTIFFS) v. MUSAMMAT AJANASIA AND OTHERS (DEFENDANTS)*

1922 *April*, 19.

Court fee—Appeal—Cross objections—Petition setting forth the grounds upon which the respondents proposed to support the decree of the lower appellate court.

Held that no *ad valorem* court fee was payable on a petition filed by the respondents in a second appeal, which, although it was more or less in the guise of a memorandum of cross objections, in reality contained merely the grounds upon which the respondents proposed to support the decree of the court below, to which the respondents in no wise objected.

Dr. M. L. Agarwala, for the appellants

Mr. J. M. Banerji, for the respondents.

Office report

"The court of first instance dismissed the plaintiff's claim for recovery of Rs. 698-4-0 on the point of limitation, but holding, as a finding on issue No. 1, that the defendants did borrow the money in suit from the plaintiffs. Plaintiffs then appealed to the lower appellate court and thereupon the defendants filed a memo of cross objection under order XLI, rule 22, of the Code of Civil Procedure as to the finding on issue No. 1, and paid only 8 annas as court fee, presumably on the ground that full court fee had been paid by the plaintiffs appellants on the appeal. As the law stands at present the memo. of cross objection is quite a definite thing from the appeal, for fiscal purposes. Consequently, the defendants respondents must pay *ad valorem* court fee on the value of the subject matter in dispute. I am supported in my views by the fact that the lower appellate court allowed their cross objection. The value of the subject matter being Rs. 698-4-0, a court fee of Rs. 52-8-0 is payable thereon. Deducting 8 annas, already paid, there is a deficiency of Rs. 52 payable by the defendant respondent for the lower appellate court."

This report was brought to the notice of the Court hearing the appeal, and the following order was passed.

* Second Appeal No. 810 of 1920, from a decree of Abdul Hasan, Subordinate Judge of Jaunpur, dated the 22nd of May, 1920, confirming a decree of Nand Lal Singh, Munsif of Jaunpur, dated the 2nd of July, 1919.

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BANERJI and RYVES, JJ.:—We do not agree with the office report. In our opinion no *ad valorem* court fee was payable in regard to the cross objections filed by the respondent. The decree of the court of first instance was in favour of the respondents, as it totally dismissed the plaintiffs' suit. The respondents could support that decree on any ground, even on a ground other than that taken by the court of first instance. If for that purpose they filed a petition stating the reasons on which they supported the decree, that did not amount to cross objections for which an *ad valorem* court fee was payable. The result of the office report would be that the appellant had to pay court fee on the full amount claimed and the respondents, who held the decree of the court of first instance, had to pay another court fee for the same claim, that is to say, two sums of court fees would be realized in respect of the same claim from both the parties. This surely could not be the intention of the Legislature, and we do not think that the respondents were bound to pay *ad valorem* court fees on their cross objections in this case.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Stuart.

1922
March, 20.

LALTA PRASAD (DECREE-HOLDER) v. SRI GANESHJI AND ANOTHER (JUDGMENT-DEBTORS).*

Civil Procedure Code 1908, section 2, clause (12)—Mesne profits—Decree granting mesne profits silent as to interest—Interest realizable in execution proceedings.

Where a decree for mesne profits is silent as to interest thereon, the decree-holder is entitled to realize in execution interest at the usual rate of 6 per cent.

Grish Chunder Lahiri v. *Shoshi Shekhareswar Roy* (1) and *Narpat Singh* v. *Har Gayan* (2) followed *Abdul Ghafur* v. *Raja Ram* (3) overruled

On the 22nd of January, 1919, the plaintiff in a suit for possession and mesne profits obtained a decree awarding Rs. 1,995-1-0 as mesne profits to the date of the institution of the suit and future mesne profits at the rate of Rs. 38-1-10 per mensem from the date of the suit until delivery of possession. The decree, however, was silent as to whether any interest on the mesne profits was allowed. On the 28th of June, 1920, the decree-holder applied for execution. He claimed possession, Rs. 1,995-1-0 as mesne profits to date of suit, Rs. 1,143-7-0 as future mesne profits, and interest on the entire amount of mesne profits claimed. The execution court held that the decree-holder was not entitled to interest on Rs. 1,995-1-0, but was entitled to interest on the sum claimed as future mesne profits. The decree-holder appealed to the High Court.

Dr. *M. L. Agarwala* and Babu *Indu Bhushan Banerji*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

WALSH and STUART, JJ.—The point raised by this appeal is covered by authority. The question is, what is meant by the expression "mesne profits" when the decree is silent as to interest. Section 2, clause (12), of the Code of Civil Procedure defines mesne profits as follows:—"those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits". If there had been any doubt as to the meaning of those words, it has been set at rest, and ought no longer to be a matter of

* First Appeal No. 194 of 1921, from a decree of Lachmi Narain, Additional Subordinate Judge of Cawnpore, dated the 8th of February, 1921.

(1) (1900) I. L. R., 27 Calc., 951.
(2) (1903) I. L. R., 25 All., 275.
(3) (1900) I. L. R., 22 All., 262.

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controversy in India, by the decision of the Privy Council in the case of *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1), where the Privy Council pointed out, in construing section 211 of the old Code, which in this respect does not differ from the section quoted above of the present Code, that "its obvious effect was to provide that a simple decree for mesne profits should carry interest on them." It is true that at the same time there is discretion in the court to penalize a party by disallowing such interest. Their Lordships explain this in the same judgment by saying : " mesne profits are in the nature of damages which the court may mould according to the justice of the case." But the question in this appeal, as in the case decided by the Privy Council, is :—" What is the effect of a decree which grants mesne profits and says nothing about interest," which is what this decree does here. The court below, possibly inadequately instructed, followed the single Judge case of *Abdul Ghafur* v. *Raja Ram* (2) and appeared not to be aware of the two-Judge case of *Narpat Singh* v. *Har Gayan* (3), which would have drawn its attention to the Privy Council decision referred to. But having regard to the cases decided subsequently, the decision in the case of *Abdul Ghafur* v *Raja Ram* (2) must be taken to have been overruled. The appeal must be allowed and execution directed to take place for the interest at 6 per cent. due by law. The case will go back to the lower court with this direction. The appellant must have his costs.

Appeal allowed.

Before Mr. Justice Piggott and Mr Justice Walsh

1922 *April*, 18.

MOHAN LAL AND ANOTHER (PLAINTIFFS) *v.* MAHMUD HUSAIN AND OTHERS (DEFENDANTS).*

Muhammadan law—Hiba-bil-ewaz—Passing of consideration necessary to validate gift.

In the case of the transaction which is known to the Muhammadan law as *hiba-bil-ewaz*, actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself *in presenti* of the property and to confer it upon the donee must also be proved *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (4) followed.

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* Second Appeal No. 421 of 1918, from a decree of H E Holme, District Judge of Bareilly, dated the 15th of March, 1918, modifying a decree of Banmath Das, Subordinate Judge of Bareilly, dated the 31st of October, 1917.

(1) (1900) I. L. R., 27 Calc., 951 (967).
(2) (1900) I. L. R., 22 All., 262.
(3) (1903) I. L. R., 25 All., 276.
(4) (1906) I. L. R., 28 All., 490.

1922

MOHAN LAL v. MAHMUD HUSAIN.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Dr. *Surendra Nath Sen*, for the appellants.

Maulvi *Iqbal Ahmad* and Maulvi *Mukhtar Ahmad*, for the respondents.

PIGGOTT and WALSH, JJ.—This is a second appeal on the part of two plaintiffs whose claim for possession of certain house property in the town of Bareilly has been dismissed by both the courts below.

The plaintiffs claim the property under a deed of sale of the year 1916 executed by two persons, Abdul Latif and Abdul Hafiz. Their case is that the said vendors obtained the property by inheritance from their mother Zohra Bibi, who, again, obtained the property by gift from her mother, Musammat Sakina Bibi. The deed of gift in question is dated the 2nd of June, 1900, and was executed, not by Sakina Bibi herself, but by one Sayid Ali Husain acting as her special attorney. The plaintiffs having been put to proof of their title, a number of issues were framed, and, as a matter of fact, both parties pressed upon the courts below alternative and inconsistent pleadings to an extent which has served to cloud the plain issues in the case and to introduce elements of confusion which have led to the delay and trouble we have found in determining the appeal. When it was first argued before us, we decided that it was not expedient that we should proceed further without obtaining clear findings upon certain questions of fact. The findings on the issues remitted by us are substantially in favour of the plaintiffs appellants, so far as they go, but as the case has been finally argued out after the return of the remand findings, we have come to the conclusion that the appeal cannot succeed.

The first question is whether Musammat Zohra Bibi held a good title to this property under the deed of gift of the 2nd of June, 1900. We may pass over a number of questions which were raised in this connection and concentrate upon what is really the essential point in the case. The deed of the 2nd of June, 1900, is unquestionably what is known in the Muhammadan law as a *hiba-bil-ewaz*, or a gift for consideration. The authority of the special attorney who executed the same most definitely was to convey this house property in Bareilly to Musammat Zohra Bibi as a gift, but for a consi-

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deration, that consideration being the surrender by Zohra Bibi of certain rights. It is not important to consider what those rights precisely were. The deed itself upon its wording carries out the intention expressed in the power of attorney, that is to say, it purports to convey the house property in return for the surrender of Musammat Zohra Bibi's rights. Their Lordships of the Privy Council, in the case of *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1), have clearly laid down the law upon this point. A conveyance by way of gift as between Muhammadans may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter, actual payment of the consideration must be proved and the *bonâ fide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must also be proved. The learned District Judge has found that there is no evidence that Musammat Zohra Bibi relinquished anything, or surrendered any rights, or, in short, returned any consideration for the conveyance in her favour purporting to be effected by this document. In view of this finding it seems scarcely necessary for us to go into the alternative question whether it is proved that possession passed, except in so far as that alternative question is involved in certain further pleas taken on behalf of the appellants. In the courts below much reliance was placed by the plaintiffs upon the contention that they and their predecessors in title had perfected a good title by adverse possession against Sakina Bibi and her heirs for twelve years and more from the date of the deed of gift. As a matter of fact, in the month of June, 1900, the property was in the possession of certain lessees and remained in the possession of those lessees until the year 1913. There is no evidence that those lessees ever paid rent to Musammat Zohra Bibi. They appear to have paid rent to Muhammad Ehsan, son of Sakina Bibi and, therefore, brother of Zohra Bibi. It is claimed on his behalf that he received that rent as owner; while the case for the appellants, when sifted out thoroughly, will be found to rest upon the contention that Muhammad Ehsan received this rent as agent for Zohra Bibi. It seems sufficient to say that there is no real foundation for this plea, either in the findings of the courts below, or in

(1) (1906) I L R, 28 All, 439 (448).

such evidence as has been brought to our notice.

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The other point taken is that the heirs of Sakina Bibi are in some way or other estopped from denying, either the validity of the transfer in Zohra Bibi's favour, or the fact of her possession. The plea is based in substance upon certain words used in the judgment of the lower appellate court which are quoted in the first paragraph of the memorandum of appeal before us. Undoubtedly the expression so quoted, taken by itself, lends some colour to the appellants' contention, although it may be noted that the expression used, namely, that the "family" had allowed the sons of Zohra Bibi to hold the property in suit as exclusive owners, is a dangerously vague one. Apart from this, however, the judgment of the learned District Judge requires to be fairly considered as a whole. When so considered, it seems clear enough that the lower appellate court intended to find, what it has found in express words in a later paragraph of the judgment, namely, that possession never passed to Zohra Bibi and that the evidence for the plaintiffs failed to prove anything more than that in the year 1913 the sons of Zohra Bibi had somehow come to be in effective possession of the house to this extent that they executed a fresh lease in favour of another tenant and managed to put their tenant into possession. This finding is not sufficient to support either the general plea of estoppel in the form in which it is taken in the memorandum of appeal, or any more explicit plea based upon the wording of section 41 of the Transfer of Property Act, No. IV of 1882.

For these reasons we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Ryves and Mr Justice Stuart.

BISHESHAR NATH (PLAINTIFF) v. KUNDAN AND OTHERS (DEFENDANTS) *

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April, 21.

Act No IX of 1908 (Indian Limitation Act), schedule I, article 139—Landlord and tenant—Tenant holding over after expiration of lease—Suit for ejectment—Limitation.

On the expiration of his lease a tenant for a term of years remained in possession of the demised premises but ceased to pay rent to the landlord. More than twelve years after the expiry of the lease the landlord brought a suit to eject his former tenant

* Second Appeal No. 1096 of 1920, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 7th of June, 1920, reversing a decree of Mohsin Ali Khan, Munsif of Nagina, dated the 22nd of January, 1920

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Held that the suit was governed by article 139 of the first schedule to the Indian Limitation Act, 1908, and was barred by limitation *Chandri* v *Daji Bhau* (1) followed *Bilas Kunwar* v *Desraj Ranjit Singh* (2) distinguished

THE facts of this case sufficiently appear from the judgment of RYVES, J.

Dr. *Surendra Nath Sen*, for the appellant.

The Hon'ble *Syed Raza Ali*, for the respondents.

RYVES, J.—This appeal came on originally for hearing before a single Judge of this Court. He was of opinion that in view of the decision of their Lordships of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* (2) and of the decision in *Pusa Mal* v. *Makdum Bakhsh* (3), it was advisable that this case should be heard by a Bench of two Judges. It has consequently come before us for hearing.

After full argument it seems to me that the question referred to this Divisional Bench is really irrelevant, and I think the appeal can be disposed of on a short point.

The facts of the case are as follows :—The plaintiff was the lessor. He, by a lease dated the 19th of July, 1892, leased some premises to the father or predecessor of the defendants for a term of three years. At the expiry of the term, the lessees (or their representatives) remained on in possession until the date of suit which was brought on the 18th of June, 1919 The plaintiff asserted that the rent fixed by the lease had been regularly paid by the defendants until within three years of the date of suit.

The main defence to the suit was that the defendants had been in adverse possession for more than twelve years, that they never paid rent and that the suit was barred by limitation.

The first court decreed the suit.

On appeal, however, the learned District Judge of Moradabad has dismissed the suit. He has found that since the expiry of the lease no rent whatever has been paid by the defendants. He has also found that no new tenancy was created otherwise than by the lease, and he, therefore, dismissed the suit as barred by limitation. On appeal before us it has been argued very strenuously that having regard to the decision of their Lordships of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* (2), it must be held that the

(1) (1900) I. L. R., 24 Bom., 504
(2) (1915) I. L. R., 37 All., 557.
(3) (1909) I. L. R., 31 All., 514.

defendants continued to be tenants of the plaintiff after the expiry of the lease until notice was served on them by the lessor under section 106 of the Transfer of Property Act. It seems to me that the decision of their Lordships of the Privy Council does not apply at all to the question of limitation and has no application to article 139 of the first schedule to the Limitation Act, which, in my opinion, governs this case. That article runs as follows:—"A suit by a landlord to recover possession from a tenant.....twelve years.....when the tenancy is determined." It seems to me on the facts of this case that the tenancy was determined on the 19th of July, 1895. It has not been proved that any new tenancy was created. By holding over without paying rent, it seems to me that the defendants became what is known as tenants by sufferance. Their position in English law has been summed up in Addison's Law of Contract, 10th edition, page 618 in the following words:—"The difference, therefore, between a tenancy-at-will and what is called a tenancy by sufferance is that in the one case the tenant holds by right and has an estate or term in the land, precarious though it may be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord and has no estate at all in the occupied premises. When the tenancy at sufferance has existed for twenty (now twelve) years, the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property." So far as the question of limitation is concerned, the law in India is not different, in my opinion, although it may not be good law to hold that a tenant holding over is in adverse possession to his landlord. In my opinion this view is supported by *Chandri* v. *Dayi Bhau* (1), where the facts were similar, and which case was followed in *Farman Bibi* v. *Tasha Haddal Hossein* (2). In my opinion the suit was clearly barred under article 139 of the Limitation Act. I would, therefore, dismiss this appeal with costs

STUART, J.—I would like to add a few words to the decision of my learned brother. It was I who referred this case to a Bench and I did so in view mainly of the position created by the decision of their Lordships of the Privy

(1) (1900) I L R, 24 Bom, 504
(2) (1908) 7 C L J, 648

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Council in *Bilas Kunwar* v. *Desraj Ranjit Singh* (1). The law governing this case appears to have been laid down in *Chandri* v. *Daji Bhau* (2). There, as here, it appears that there was a tenancy by instrument, which had expired more than twelve years before the date of the suit. There, as here, after the expiration of the tenancy, a tenancy at sufferance had come into existence There had been no payment of rent. The same was the case here. There had been no explicit recognition of the authority of the landlord. The same was the case here. It would be difficult to find two cases in which the facts were so similar as in the present case and in the Bombay case. It was held by JENKINS, C J, that article 139 must govern the case and that the period from which the period of limitation began to run was the period from which the tenancy by instrument had expired. In the absence of any other authority, I should consider the Bombay decision conclusive in the matter, and it only remains to be seen whether there is anything in the Privy Council decision to which I have already referred which can be invoked to overrule the decision of JENKINS, C. J. Their Lordships of the Privy Council say: "A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord." That clearly is the law, but does it in any way affect the present case? I think it does not. The defendants cannot be permitted to deny the plaintiff's title. They have foolishly denied it but they cannot be permitted to do so. The plaintiff is undoubtedly the land-holder and the defendants are tenants by sufferance, but once having recognized that the tenants are so estopped, the fact still remains that the suit has been instituted beyond the period of limitation allowed by the law. In these circumstances I accept the view of my learned brother and would dismiss this appeal.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

(1) (1915) I. L. R., 37 All., 557
(2) (1900) I. L. R., Bom., 504

Before Mr. Justice Walsh and Mr. Justice Ryves

KHUNDI DEVI (DEFENDANT) *v.* CHOTE LAL (PLAINTIFF).* 1922

April, 4, 24.

Act No. VIII of 1890 (Guardians and Wards Act), section 7—Appointment of guardian to a minor—Power on the Judge—Procedure—Judge not bound to observe the same formality of procedure as in an ordinary civil suit.

In proceedings under the Guardians and Wards Act the District Judge exercises a parental jurisdiction and is not bound to observe that formality and precision of procedure which the Code of Civil Procedure enjoins in a Court in the trial of a suit properly so called. The High Court will not upset an order appointing a guardian to a minor, if the order is in itself a reasonable one, merely because the Judge has in some minor detail failed to observe rules of procedure and evidence.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Girdhari Lal Agarwala*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

WALSH and RYVES, JJ.:—This is one of those difficult cases in which the mother appeals against an order appointing the father personal guardian of the minor, thereby taking out of the custody of the said mother her infant boy of six. It is needless to dwell on the painful nature of a case of this kind, which is bound to inflict mental suffering upon one or other of the parties, whatever order the court may think it its duty to pass. Unfortunately, the father and mother are living apart and, at present, seem unable to keep a happy home in one another's company. The mother is a *pardanashin* lady who resides with and is doubtless under the influence of her own family, who are said to be well-to-do merchants. To the knowledge of the learned Judge who disposed of the matter, (and in these guardianship cases one has to assume a good deal of knowledge on the part of the court, which is really a court trusted by law to decide them, although the matters may not appear quite strictly on what is called the record), there had been previous unpleasantness between this married couple. The mother had applied for an order against her husband as a lunatic, an application which, judging from the fate it sustained, provided some evidence against herself, which might have justified a similar application against her; and one of the uncles, who is accused of being behind this application, had made what the same Judge described as a most impudent application to be appointed guardian himself, which he did not even attend to support. As long as I sit in this Court, at any rate, I shall turn a deaf ear to all argu-

* First Appeal No. 13 of 1922, from an order of T. K. Johnston, District Judge of Agra, dated the 14th of January, 1922

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ments based upon proceedings under the Guardians and Wards Act which attack them on the ground of a lack of that formality and precision of procedure which the Code exacts from a court in India in a trial of a suit properly so called. The exercise of a parental jurisdiction in guardianship matters by a District Judge is by no means to be weighed in golden scales like the ordinary trial of a suit between parties for money or land, and under the painful circumstances of this case, and with the previous knowledge that the learned Judge must have had about the family, we think the learned Judge was quite entitled to receive and to weigh a report called for by him from a person in the responsible post of a Tahsildar under the control of the Collector. We are not impressed by Mr. *Agarwala's* contention that he has acted without proper regard to the Act of Parliament, Statute, or the Laws of Evidence, or the procedure laid down by the Civil Procedure Code. On the whole, the order of the learned Judge appears to us to be a reasonable one Mr. *Agarwala* has succeeded in making one real attack upon it. The learned Judge said he was prepared to reconsider the matter if the mother got an order for separate maintenance from a Civil or Criminal Court. This is perhaps hardly a relevant criterion to test the *bona fides* of an Indian *pardanashin* lady living with her family as this lady is doing. No doubt the Judge wanted to see whether there was a genuine test which could be applied to the reasons which animated the lady in living apart from her husband. We agree with Mr. *Agarwala* that this was putting perhaps too severe a strain upon the lady. We have certain statements before us made on affidavit by the father himself in an *interim* application to this Court, and also made by a *pairokar* of the lady (we should have thought more of the lady and her relations if one of them had had the courage to make an affidavit himself instead of leaving it to a *pairokar*), which the learned Judge had not, and even assuming that the learned Judge had not sufficient reasons for making the order that he did, we are satisfied, on the additional matter before us, that the order which he made was right. Painful though it may be to the mother, we think there is nothing which could justify us in depriving the father of his natural and legal right to the custody of his own child, assuming as we believe him to be an ordinary respectable citizen with the natural feelings of

a father towards his son. We have no evidence which would justify us in treating him as a person who was likely to do any injury either to the person or property of his own child. We should have been better satisfied if he had stated on oath the women folk who assist him in keeping his house and under whose eyes the boy will be when he comes into the house. The father is stated, on the record, to be living alone, and he has not mentioned the matter in his own affidavit, but we are assured that he has in fact a sister living with him who would presumably be responsible and trusted by him to look after the child in the way in which even a loving father is unable to do. We should also have preferred to know exactly what intentions the father has with regard to the immediate education of the child, particularly as we are taking it away from the mother. It is necessary for every court to provide, as far as it possibly can, against the risk of a child being allowed to run wild. But these are matters which must be usually attributed to the good sense and good feelings of a father who wants to look after his own child, and the absence of any explanation with regard to the arrangements does not appear to us sufficient reason for holding our hand with regard to the execution of the order, but we do think there are grounds which we must insist upon as in the nature of a security for the father's proper treatment of the son in the near future.

We confirm the order of the Judge appointing the father guardian of the child and of the property. We remove the stay which has been imposed by previous orders of this Court and direct the mother, in whose custody the child is, to produce the child or to make arrangements for its production in the court of the District Judge next Saturday morning for the purpose of handing it over to the father.

We adjourn the further hearing of the case until Monday, the 24th of April, 1922. In the interval Chotey Lal, the father, must file an affidavit, a copy of which must be supplied to Mr. *Agarwala*, stating the arrangements which he has made or proposes to make, for the female relations who will look after his house and who will look after the boy, and the arrangement which he proposes to make for the boy's education. The nature of his affidavit, and his method of living up to it, will be the test of his *bona fides*. On the other hand, as a *locus pœnitentiæ*, as we recognize that it must be a painful matter

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for the mother, although we do not direct it, we give the mother or any brother of hers, Basdeo for example, whom she may appoint, liberty to appear before us in person on the date fixed to give evidence, if he sees fit or is so advised by Mr. *Agarwala*, on the final disposal of this matter when the affidavit of Chotey Lal is filed.

In particular and without prejudice to the generality of the foregoing observations, we direct that an order be issued forthwith and communicated to the District Judge at Agra, that Musammat Khundi Devi either produce or make arrangements for producing her infant son before the District Judge next Saturday at 10.30 a.m. for the purpose of handing the boy over to the father, and that Chotey Lal do file an affidavit in this Court in accordance with our directions.

After hearing the father cross-examined on the additional affidavit which he has filed in accordance with our order, we have no hesitation in confirming the order of the court below and dismissing the appeal

Appeal dismissed.

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April, 26

Before Mr. Justice Piggott and Mr. Justice Walsh

GOSWAMI PURAN LALJI (PLAINTIFF) v. RAM BIHARI LAL AND ANOTHER (DEFENDANTS) *

Hindu law—Endowment —Failure of nominated manager to act—Settlor's widow competent to assume the management of the endowed property, but not to appoint a new manager by will

A Hindu, by deed dated the 15th of May, 1871, created an endowment of certain property in favour of an idol, and named a certain person as manager of the endowed property. The manager so nominated never in fact took charge of the property; but after the death of the settlor his widow took possession and managed the property in accordance with the intentions of her husband. The widow, however, proceeded to make a will appointing a new manager in succession to herself, and upon her death, the heir of the settlor sued to have this appointment set aside.

Held that the suit would lie. Although the widow was justified as her husband's representative in assuming charge of the endowed property, and might in her life-time have nominated a manager whose appointment would have ensured after her death, she had no power to dispose of the managership by will in the presence of an heir of the settlor.

Gossami Sri Gridharji v. *Romanlalji Gossami* (1), *Chandranath Chakrabarti* v. *Jadubendra Chakrabarti* (2), *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3), *Sheoratan Kunwari* v. *Ram Pargash* (4), and *Sheo Prasad* v. *Aya Ram* (5), referred to

* FIRST APPEAL No. 44 of 1920, from a decree of Peare Lal Katara, Subordinate Judge of Muttra, dated the 16th of January, 1920

(1) (1889) I. L. R., 17 Calc., 3.
(2) (1906) I. L. R., 28 All., 669.
(3) (1907) I. L. R., 35 Calc., 226
(4) (1896) I. L. R., 18 All., 227.
(5) (1907) I. L. R., 29 All., 663

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GOSWAMI PURAN LALJI v. RAS BIHARI LAL.

THE facts of this case are fully stated in the judgment of WALSH, J.

Munshi *Durga Prasad* and Munshi *Narain Prasad Ashthana*, for the appellant.

Munshi *Girdhari Lal Agarwala*, for the respondents.

WALSH, J.—This is an appeal from a judgment dismissing the plaintiff's suit. The suit was decided by the Subordinate Judge of Muttra. As regards the Cawnpore property the appeal fails. As regards the Bindraban property I have come to the conclusion that the appellant is right and the plaintiff is entitled to succeed for the following reasons:—(I will for the moment disregard the reasons given by the lower court for thinking otherwise.)

The property was dealt with by a deceased virtuous man who wanted to dedicate it to a certain idol. The deed of dedication is contained in the document dated the 15th of May, 1871. So far as the property goes with which this judgment is concerned, and in regard to which in my opinion the plaintiff is entitled to succeed, the general intention of the donor, to be gathered from the language of the deed which is extremely difficult to follow because it appears to contain provisions inconsistent with one another, was, that one Sangam Lal, who was called the second donee, should make arrangements for the worship and service in a temple, collect the rent of the property and spend it on food, offering and entertainment and in no other way. His representative was to act in a similar manner, such provision seeming to imply a power to appoint a representative if he saw fit, but no one was to have the power to transfer the endowed property. Should anybody attempt to transfer the endowed property or to misappropriate the funds, a right was given to the *panches* and managers of the temple of Banke Bihariji Maharaj to take steps to prevent it. As I understand this provision, the latter persons were intended to be a kind of *cestui que* trust, or guardians of the corpus, who would be sufficiently interested to be recognized by law as persons entitled to interfere in the case of a breach of trust.

The first donee, the widow, to whom the deceased gave the remaining property, survived him for many years. The second donee, Sangam Lal, for some reason or another, which does not appear on the record of either this suit or of

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Walsh, J.

the previous suit to which I am about to refer, never took upon himself the office of manager and it is undisputed that the widow got into possession and retained possession, and if the recitals in the will, the validity of which is raised in this suit, are to be accepted as true, enjoyed and executed in every way the office of manager or *mutawalli* in place of Sangam Lal.

In the year 1893 the father of the present plaintiff, one Gosham Makhan Lal, brought what appears to have been a foolish suit, and if he knew of the deed of endowment to which I have just referred, must have been a fraudulent suit, against the widow. He launched it in the guise of an innocent, plausible and natural claim by an ordinary reversionary heir against a widow who had acquired a life-interest in her deceased Hindu husband's property and was, therefore, prohibited by Hindu law from dealing with the corpus, alleging that she had executed a will in respect of this property in 1893 in favour of her relation Ram Lal, to whom reference will be made in a moment, and sought to have the deed cancelled and declared void. That suit was decreed in favour of the then plaintiff, though on what ground does not appear from the only judgment which we have on the record. The decree was set aside on the 23rd of January, 1897, by a Bench of this Court upon the ground that every allegation which had been alleged by the plaintiff in his plaint had failed and that he had no cause of action for asking for the will to be set aside as a reversionary heir. It was at that date either common ground or pleaded against the then plaintiff that the property had been assigned by the deceased husband to the *panches* of Thakur Banke Bihariji Maharaj and that the widow was given no interest or right of any kind in the property but that she was for the moment in possession in some way or another of the endowed property because the appointed manager Sangam Lal had not taken up his office and that the whole foundation, presumably fraudulent, on which the plaintiff had litigated did not exist in fact. The learned Judges threw out a suggestion that this lady in acting as manager might be only a trespasser and that if she was, there might be a right in the heirs of Sangam Lal, who may be presumed by this time to have been dead, or the *panches*, to put an end to her trespass,—questions which must depend upon the interpretation of the deed of endowment and the

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Walsh, J.

rights of the managers as they are provided, but questions, which in my opinion, did not and could not lawfully arise for decision in the plaintiff's suit and which this Court did not purport to determine. They pointed out to the plaintiff that so far as the management of the endowed property was concerned, he, at any rate, had no right to interfere, which was no doubt a correct but superfluous statement, it being sufficient for the decision of the appeal that he had no shadow of a claim as reversionary heir to set aside the will of 1893. So far as I can gather from the evidence in the suit and from anything which has been suggested on behalf of the respondents before us, that is a correct and comprehensive statement of what happened in the prior litigation. In course of time the former plaintiff having died, and finally the widow herself, this suit has been brought by the present plaintiff who is admittedly the heir of the deceased donor. In order to make the matter clear, which, I regret to say, the judgment of the court below fails to do, I do not think I can do better than quote from a statement which was made by the plaintiff's pleader in the court below setting out correctly as a matter of form, if reference is made to the plaint, and also I think correctly in substance, the nature of the claim. Having referred to the *waqf* and the appointment of Sangam Lal and the widow as *mutawalli*, the pleader goes on as follows:—"My claim is that Sangam Lal has never got possession over the property as *mutawalli* and Musammat Achamb Kuar remained in possession as *mutawalli*. She had under the deed of endowment of 1871 no power to appoint a *mutawalli* in her place. The plaintiff as heir brings this claim under the Hindu law."

The claim was to have it declared or decided that an alleged power of appointment which the deceased widow had made during her life-time under a will dated 1909 in favour of certain persons to whom I will refer in a moment had no legal authority, was not justified by the deed of endowment and, in the absence of some legal authority, custom or usage, was not justified by the general rule of Hindu law. I think it is clear that the plaintiff has successfully established the broad principle involved in that statement in this case. The authorities cited are not on all fours with the present case. Few cases are on all fours with one another. But it appears to have been laid down per-

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Walsh, J.

fectly clearly by the Privy Council as long ago as 1889, in *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (1) that "the office of a shebait is vested in the heir or heirs of the founder provided that there is no usage, course of dealing or circumstance showing a different mode of devolution". A different mode of devolution must of course mean some mode warranted by law. Obviously a mode contained in an express condition of the endowment would be a mode warranted by law, because every man has a right to do what he pleases with his own property and to indicate the limits within which the succession to the management or control or ownership of his property shall be continued after his death when he is no longer here to direct operations. The authority in question undoubtedly covers the position of the office of the shebait. The point specifically raised in this suit is the power of appointment to such office as is shown by the statement of the pleader which I have quoted. The plaintiff distinctly put in issue the power of appointment which the lady had endeavoured to exercise by her will of 1909, and did not specifically raise the question of the succession to the office itself. That case has been followed by two or three Benches of this Court, particularly by a two-Judge Bench in *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (2), a case which would otherwise be on all fours but apparently is not on all fours with this suit inasmuch as the lady who had been appointed *pujari* under the will of the original donor and who had made the will seeking to appoint the next manager which the heirs of the founder challenged by the suit was not, or at any rate is not shown by the report to have been, the widow or heir of the deceased donor. If she had been, there would have been no distinction between this case and that. There is a further relevant decision in 1907 by the High Court of Calcutta, *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3), which lays down another cognate but somewhat narrower rule, namely, that a shebait cannot as such, by will, alienate the office of shebait. The decision of the Privy Council has also been followed by this Court in *Sheoratan Kunwari* v. *Ram Pargash* (4) and *Sheo Prasad* v. *Aya Ram* (5), and, as I gather from the learned Subordinate

(1) (1889) I. L. R., 17 Calc., 3
(2) (1906) I. L. R., 28 All., 689.
(3) (1917) I. L. R., 35 Calc., 226.
(4) (1896) I. L. R., 18 All., 227.
(5) (1907) I. L. R., 29 All., 663.

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Judge's judgment, was accepted by him in deciding the first issue in the suit, he basing himself in his judgment upon I. L. R., 25 All., 639, to which I have already referred. So far as I was able to understand the observations addressed to us yesterday on behalf of the respondent, this legal position was accepted as correct by the respondent. That being so, it seems to me quite clear that the plaintiff at that stage had *prima facie* established a right to succeed in the suit, a state of affairs expressed by the learned Judge of the court below that the plaintiff could maintain the suit if it did not "fail on the merits". Inasmuch as he dismissed the suit, it must be assumed that he came to the conclusion that it did fail on the merits. What were the merits which he intended to decide to be sufficient to justify its failure, is the problem which I am, on a perusal of his judgment, unable to solve. He finds that the widow was appointed to supervise over the management of Sangam Lal. I do not know where he gets that from, but it is not of very great importance because as Sangam Lal did not manage there was nothing to supervise, and he goes on to find that she remained in possession only as a trespasser. He had already found that the suit was not barred by the Statute of Limitation. It seems to me, therefore, that having accepted the principle upon which the plaintiff based his claim, and having found that the position of the widow who made the will was merely that of a trespasser, the logical consequence of these two propositions would be that her right to appoint a successor failed and that she had not discharged the onus cast upon her by the plaintiff's *prima facie* right. His final conclusion on issue No. 7 is absolutely unintelligible. It looks to me as though he had been frightened by a dictum of this Court in the previous decision which had really no bearing on this suit, and while expressly holding that the previous judgment of the High Court did not operate as *res judicata*, it was sufficient to justify him in saying that the plaintiff had absolutely no right to maintain the suit. The view pressed upon this Court on behalf of the respondent has been substantially this:—It may be put in more than one way:—First, it was said that the widow being the heir during her life-time, she might reasonably be held to have the power of appointing a successor to Sangam Lal. Presumably she could, for what such an appointment would be worth, to the extent of her

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life until, as the High Court said in its previous judgment, Sangam Lal or the *panches* attempted to interfere with her right, but whether she could do so by will so as to bind the present plaintiff after her death, which is really the question in this suit, must, I think, depend upon the terms of the deed of endowment. If the right to do so cannot be found there, in my opinion it cannot exist in law. To hold that she could do so on some general principle of law analogous to the right of the beneficial owner, would seem to me to give a higher right to a Hindu widow as heir of her deceased husband than has ever been recognized by Hindu law or custom; that is to say, although she is not in fact a beneficial owner, and the person deriving such benefit as would accrue from the appointment would not be beneficial owner of the corpus, nonetheless it would seem to me to recognize the right of a Hindu widow, who as heir has no more than a life interest, to do more with endowed property than she can admittedly do with unendowed property. So far as I can speak with any confidence of the terms of the deed of endowment, I am satisfied that no power of appointment was ever contemplated by the deceased donor or intended to be conferred upon his widow.

The respondents' case was also put, as I understand it, in this way:—That if anybody had a power of appointment under the deed of endowment, it was the *panches* or manager referred to in the latter part of the deed. I do not think the deed is capable of that interpretation. I think the real meaning of the provision with regard to them is that they are persons who are given the right to interfere with the *de jure* manager and to correct and prevent any defalcations or other mismanagement by him while he is in office. But assuming that that right is conferred upon the *panches* and managers of the temple above referred to, I have been unable to see how that point can avail the defendants in this case. It is not universally true, but I think it is true in this class of cases that a person claiming to be either in office, or in possession, or to resist a declaration or assertion of right by a person *primâ facie* entitled, must stand upon his own right or on that of the persons through whom he claims. He cannot set up what is called a *jus tertii*. It does not seem to me that the defendant, even if he had relied upon that point, would have been entitled to succeed upon it, but I think for

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the purposes of this case it is sufficient to hold that it was never pleaded. It was not the ground on which the respondent succeeded in the court below and, so far as I was able to understand the argument addressed to the Court on behalf of the respondents, was not relied upon by him before us.

It, therefore, comes back, as Mr. *Durga Prasad* rightly said, to a very simple question. Is the widow of the deceased donor justified by the power given by the deed of endowment of 1871 to make the will of 1909? My answer to that question is, no. In conclusion, I may refer to certain passages in the will itself which, although this cannot really be used as decisive against the present defendants, go very far to confirm me in the strong view I take of this defence. I think the person who was responsible for drafting or settling this will on behalf of the deceased lady discreetly avoided referring to the power under which she was purporting to appoint. I am satisfied that the appointment was made by her, *qua* manager and not as heir. If it had been made as heir there was no reason why she should not have said so, but in the somewhat portentous recital she distinctly alleges that she has been in exclusive possession merely as manager, and in the first operative clause appointing her minor relative she directs that "he shall like myself be the *mutawalli* and manager of every kind of movable and immovable property and shall as such have all sorts of powers". She discreetly said in the recital "I have power to make a fresh arrangement". So far as a document can assert its own legal authority, I think this document was intended to assert that the power so conferred upon her was inherent in her as *de facto* manager and that it was as such that she sought to exercise it. In my opinion that is sufficient to dispose of the defence. I cannot part with the case without expressing, although it is really not necessary for the decision which I think we ought to arrive at, the very strong view which I take that this appointment in the will was purely illusory, and if a general power in her favour were to be collected from the deed of endowment or could be, without doing violence to the principles of Hindu law, attributed to her as heir, I think there would be strong ground for holding that the appointment contained in clause 2 of the will is what is known in English law as "a fraud upon the power". The appointment of Ras Bihari, her daughter's son, who she says has been

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brought up as a begotten son and lives with her, is a mere sham. She appoints two persons, his mother Musammat Ram Dei, and Ram Lal, to be guardians of the said minor. So far so good. But she goes on to provide that when the minor attains majority, the two persons she has appointed as guardians during his minority shall continue to look after the property, and during their life-time, the executor, in other words, the so-called manager of the endowment now being of full age whom she has appointed, is to perform all works in conformity with the opinions of the said two persons. To my mind that provision left these two persons masters of the situation. It made the appointment by the deceased man, of the *panches* and the representative of Sangam Lal as a sort of watch-dog over the corpus with a view to preventing breaches of trust, practically a dead letter. Under such a provision the so-called manager, Ras Bihari, could never be touched for any breach which he might commit, because he would have an absolute answer under his own appointment, namely, that he was bound to comply with the directions of two other persons, and as far as I can see, it would be extremely difficult for anybody in a court of law to reach these two other persons, and it is not difficult to see how the whole of the endowment could be squandered and misappropriated, with very great difficulty in preventing and almost insuperable obstacles in the way of punishing such misfeasance. I take a very strong view, apart from any other question in this suit, that the alleged appointment made by the widow under this will was as far from and as hostile to the intentions of the original donor as anything could be, and I am satisfied that our decision is in accordance with the merits as well as in accordance with the law. To that extent the plaintiff's appeal must be allowed. It must be declared that the appointment is vested in him and that the will so far as it purports to deal with the trusteeship or managership of the Bindraban property is void and of no effect and that the plaintiff is entitled to take possession. The parties will pay and receive costs in proportion to their failure and success in both courts.

PIGGOTT, J.—We are dealing in this case with property held under a trust created by a deed of endowment, and the terms of that deed are necessarily the most important matter for consideration. This deed of the 15th of May, 1871, is

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a singularly ill-drafted document and it would be quite easy to take particular portions of it and show that their apparent meaning is contradicted by certain other portions. The most glaring example of this is to be found in the fact that what may be called the operative portion of the deed, where the donor, Sri Goshain Narsinghji, purports to make a gift of property in favour of his wife, Musammat Achamb Kunwar, and of Sangam Lal, contains an exception excluding from the operation of the gift the immovable property specified at the foot of the deed which is the principal subject-matter of the present appeal. It is only inferentially, by means of words used in a later portion of the document, that one can understand that the executant intended to make a gift of this immovable property in favour of an idol. We must, however, take it as an admitted fact on the pleadings that a trust was created in favour of an idol. The questions remaining to be considered are what this idol was and what directions the founder of the trust left regarding the management of the same. It is quite clear that the trust was to be mainly in favour of an idol described by the name and title of Sri Thakur Radha Bihariji Maharaj whose image, if it was in existence at all at the date of the deed, had not yet been installed anywhere. It was left to the widow, Achamb Kunwar, to instal this idol in a particular shrine, described as amongst certain buildings which "have been built and are still under construction" in an earlier part of the deed. When this idol was so installed he, considered as a juristic personality, was to have the enjoyment of the income from the immovable property specified at the foot of the deed and the management of this property, with directions for the proper application of the income, was conferred upon Sangam Lal. It may fairly be inferred from an expression used in the deed that this office of manager was intended to be hereditary in the family of Sangam Lal. It is by no means clear, however, whether the actual gift of the corpus of the property was in favour of the idol already mentioned from the date of its installation by the widow. The temple which Sri Goshain Narsinghji had built, or had begun to build, for the reception of this idol was evidently situated in close proximity to a larger temple dedicated to an idol described as Thakur Banke Bihariji Maharaj, which temple was in charge of a managing committee of some sort referred

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to in this deed. According to the terms of the deed it was this idol installed in the larger temple, in the charge of this managing committee, which was "ultimately" to be the owner of the immovable property. The real and principal difficulty about the interpretation of the entire document is this word "ultimately". On the face of it, the document is a deed of gift to take effect immediately from the date of its execution and, in so far as certain property movable and immovable was to be placed in the possession of Achamb Kunwar and of Sangam Lal, respectively, the deed evidently did operate from the date of its execution. Those portions of the deed which relate to the application of the income could not come into force until the idol of Sri Thakur Radha Bihariji Maharaj was installed in the small temple constructed by the executant, or commenced by the executant and finished by his widow after his death. There is nothing in the terms of the will to suggest that the word "ultimately" which qualifies the gift in favour of the idol of Banke Bihariji Maharaj, in the larger shrine, refers to any date subsequent to the installation of the less important idol in the small shrine. I think it must have been for some such reason as this that in the former litigation it was considered that the ultimate right to the management of the immovable property specified at the foot of this deed of the 15th of May, 1871, vested in the committee of management in charge of the larger shrine of Thakur Banke Bihariji Maharaj. I agree, however, that these considerations cannot determine the result of the present suit. I do think that a defendant in possession of immovable property is entitled to resist a plaintiff claiming possession of the same by setting up a *jus tertii*, and that there is nothing in the circumstances of the present suit to qualify that right. If, however, a defendant wishes to set up such a defence, he should certainly take the responsibility and submit to the possible consequences of doing so in plain language. After carefully studying the written statement filed by the defendant in the present suit it does seem to me that the rights of the temple of Thakur Banke Bihariji Maharaj, or of the idol therein installed, or of the committee of management in charge of that temple, were not expressly pleaded or put in issue.

With regard to the other questions raised before us, the position I would take up is a simple one. We must assume,

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as between the parties to this litigation, that Sangam Lal, the manager appointed under the deed of endowment, either refused to act, or in some other manner clearly indicated that he did not intend to take up the trusteeship offered him under the terms of this deed. There was then beyond all question a right to appoint a new trustee vested in some one or other. The widow, Musammat Achamb Kunwar, seems to me to have acted in good faith and to have done her best to carry out the wishes of her late husband. The first thing she had to do was to instal the idol in the small shrine referred to in the deed of endowment, and it is not denied that she did this. In the absence of another manager it seems to me that she was perfectly entitled, after her husband's death, to take up the management of the trust property herself. The only persons who could question her right to do so would be the committee in charge of the larger temple of Thakur Banke Bihariji Maharaj, if they held that under the terms of the deed of gift Sri Goshain Narsinghji had so divested himself of this property as to deprive his heirs after him of any right of appointment, the ultimate management of the trust resting entirely in the said committee. Assuming, however, that this committee did not concern itself in the matter, the widow would be carrying out the intentions of her late husband in installing the idol and making arrangements for its due worship. As a matter of fact she has gone a great deal further, because in the will which was made the subject-matter of the present suit she has dedicated the entire balance of her property for the benefit of another idol to be installed somewhere at Cawnpore. Now my own view regarding the question of law which has been principally adopted before us is this, that under the circumstances assumed by the parties to this litigation, and putting aside altogether the question of the *jus tertii* to which allusion has been made, if Musammat Achamb Kunwar had seen fit, upon the failure of Sangam Lal to take up the office conferred upon him by this deed, to make another appointment to take effect immediately, she had a right to do so as representing the estate of her deceased husband, and she had a right to make an appointment which would enure beyond her own life-time. I think, however, on the authorities it cannot be held that she had a right virtually to appoint herself as manager and then to endeavour, by means of a

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testamentary disposition to take effect after her death, to continue this right of management in favour of relatives of her own. For these reasons I concur in the decree and order proposed.

Decree modified.

Before Mr Justice Piggott and Mr Justice Walsh

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April, 27

SABAL SINGH (DEFENDANT) v. SALIK RAM SINGH (PLAINTIFF).*

Second appeal—Hindu family—Question of jointness or separation—Finding of fact or law.

The question whether a Hindu family is joint or separate is not necessarily a question of fact merely, but in certain circumstances may be a mixed question of fact and law and open to reconsideration by the High Court in second appeal.

THE facts of this case, so far as they are necessary for the purpose of this report, appear sufficiently from the judgments.

Pandit *Uma Shankar Bajpai* (for Pandit *Krishna Narain Laghate*), for the appellant.

Maulvi *Iqbal Ahmad*, for the respondent.

PIGGOTT, J.:—The question in issue in this suit was whether two brothers, Sarju Singh and Salik Ram Singh, were or were not members of a joint undivided Hindu family at the time of Sarju Singh's death. The trial court found that there had been separation and had given very strong reasons for that opinion. The learned District Judge has, on appeal, recorded a contrary finding and it has been pressed upon us that we ought to accept that as a finding of fact. He has undoubtedly endeavoured to record it as a finding of fact; but in arriving at his conclusion, he has misrepresented the law on the point and he has used expressions in his judgment inconsistent with his own finding. The principal point against Salik Ram Singh, who was the plaintiff in the suit, was that he had made statements while under examination which virtually amounted to admitting that there had been separation. We know that there had been separation in residence and in mess, for Salik Ram Singh had gone to Calcutta and taken up service there, while Sarju Singh was living at home and looking after his cultivation. Sarju Singh sold a specified half share in the ancestral property, describing the same as his own share; and later on Salik Ram Singh himself sold the remainder and described it as his own share.

* First Appeal No. 177 of 1921, from an order of Jogindro Nath Chaudhri, District Judge of Azamgarh, dated the 25th of August, 1921

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The learned District Judge himself, in discussing the plaintiff's deposition, says that what the plaintiff deposed was that in the joint property in suit he and his brother, Sarju Singh, each had a half share. If each of them was the owner of a defined half share, then there had been a specification of shares sufficient, under the circumstances of the present case, to complete the break-up of the joint family and to constitute each of the brothers a separate Hindu. It has been contended before us that the lower appellate court has acted upon the evidence as a whole, and there is, no doubt, some force in this argument. What the learned District Judge, however, says regarding the rest of the oral evidence is that the Munsif "admits" that the defendant's witnesses also say that Sarju Singh was joint with the plaintiff. Now the trial court had noted that certain witnesses for the defendant had made statements against the defendant and in favour of the plaintiff's contention. He went on to say that those witnesses had, in his opinion, been won over by the other side and were deposing falsely. The lower appellate court has not said that it believes those witnesses, and it is certainly unsatisfactory in a high degree to see a carefully reasoned judgment dealt with on appeal as that of the trial court has been in this instance. It is sufficient, however, for us to say that, in our opinion, the finding of the lower appellate court proceeds upon an erroneous view of the law and that it is not a consistent finding, inasmuch as in his review of the evidence, and more particularly of the plaintiff's own deposition, the learned District Judge has recited, and apparently accepted as established, facts which would be sufficient to support the conclusion arrived at by the first court and which are inconsistent with the finding of jointness recorded by the lower appellate court. Under the circumstances we think we are warranted in setting aside what we consider a clearly erroneous finding and restoring the decision of the trial court. We do accordingly set aside the order and decree of the lower appellate court and restore that of the court of first instance, with costs throughout.

WALSH, J.—I agree. I think the case* relied upon by Mr. *Uma Shankar Bajpai*, although not an authority for anything but itself, as it does not purport to lay down any principle, and indeed the Judicial Commissioner from whom the

* *Amrit Rao and others v. Mukund Rao and others* (1921), 58 I. C. Cases, 806

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appeal was brought had overruled the District Judge on a question of fact, so that their Lordships were free to take their own view of the matter, does, on the other hand, justify the view that where fundamental facts are admitted by a party inconsistent with his case and with his testimony, it does become a question of law whether, for example, jointness or separation can legitimately be found on such evidence, or to put it as their Lordships put it in the case in question :

" The conclusion in this case before us that the plaintiff was a member of a joint family is not a sound or a legitimate conclusion on the facts proved and it, therefore, may be interfered with as an erroneous legal conclusion."

The learned Judge himself has done his best to support this view of the matter inasmuch as a sentence in the basic reasoning of his judgment contains a complete misstatement of the law, namely, the reference to the separate dealing of the half share in the joint property. I should not have thought it necessary to add anything to what my brother has said had it not been for the singular features of this judgment which may be due, it is true, to carelessness, but for which at present I am unable to suggest any reasonable explanation. The learned Judge uses this expression, which in itself is a misuse of language, in reference to a Judge whose judgment he is reviewing in appeal :—

" The learned Munsif admits that the defendant's witnesses say that Sarju Singh was joint with the plaintiff."

A learned Judge or Munsif does not " admit," and the use of such language is totally misconceived and out of place in an appellate court's judgment. But the fact is that the learned Munsif was careful to state what was the sworn testimony of the defendant's witnesses to whom the District Judge refers and to add that in his opinion they were unworthy of belief because they had been got at by the other side. If that is so, it would appear that in the opinion of the Munsif there has been a certain amount of activity on the plaintiff's side independently of the proceedings in court, and it would be well, in my opinion, if the learned Judge, to whom a copy of this judgment should be sent, would send an explanation, at any rate, to me, of the passages to which I have referred in his judgment.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh

MUNNU LAL (OPPOSITE PARTY) v. KUNJ BIHARI LAL (APPLICANT) * 1922 May, 1.

Act No. V of 1920 (Provincial Insolvency Act), sections 5, 75 (3)—Appeal—Review of judgment—Appeal from order granting review—Civil Procedure Code (1908), order XLVII, rule 7.

A District Judge sitting as an appellate court in insolvency has the same powers as an appellate court under the Code of Civil Procedure. *Inter alia* he is competent to review his judgment in appeal, and if he does so, an appeal from that order will only lie if the provisions of order XLVII, rule 7, of the *Code of Civil Procedure* are applicable *Shikri Prasad* v. *Aziz Ali* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Panna Lal*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

PIGGOTT and WALSH, JJ.—The court of the District Judge of Aligarh sitting in insolvency had before it an appeal from a decision of the Subordinate Judge of that place in the exercise of insolvency jurisdiction, by which certain questions arising under section 4 of the Insolvency Act, No. V of 1920, had been decided in favour of the Receiver in bankruptcy for the benefit of the general body of creditors. The District Judge did not hear or dispose of the appeal on the merits. He recorded a finding, if it can be called a finding, that the questions raised by the pleadings of the parties in this matter were of such a nature that they ought to be decided by a regular suit and not in the course of insolvency proceedings. On this ground alone he allowed the appeal, set aside the decision of the Subordinate Judge and gave certain directions to the Receiver. A little more than two weeks later the Receiver petitioned the District Judge, pointing out, in the first place, that it was impossible for him to comply precisely with the directions which had been given him. In issuing those directions the District Judge had overlooked the fact that possession had passed under the transaction which the Receiver was seeking to impugn, so that a suit for a mere declaration would not be maintainable. The Receiver asked the District Judge, in effect, to reconsider his own position and submitted that the view which the District Judge had taken regarding the powers and duties of an insolvency court in a matter of this sort, was a mistaken one and not in accordance with the latest decisions of this Court. Reference has since been made to the case of *Shikri Prosad* v. *Aziz Ali* (1), which was published

* First Appeal No. 16 of 1922, from an order of K. A. H. Sams, District Judge of Aligarh, dated the 23rd of December, 1921.

(1) (1921) I. L. R., 44 All., 71.

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after the District Judge had passed his first order on the appeal. The District Judge issued notice to the opposite party and, after hearing both parties, passed an order granting a review of his own previous judgment and fixing a date for hearing and determining the appeal on the merits. We have before us an appeal against that order, and a number of legal objections have been raised on both sides. We are content to say that, in our opinion, the District Judge had jurisdiction to review his own order, because section 5 of the Provincial Insolvency Act, No. V of 1920, gave him, when sitting as an appellate court, the same powers under the Code of Civil Procedure which he would have had if he had been sitting to hear any ordinary appeal. On the other hand, it has been questioned before us whether there is any right of appeal from this order granting review of judgment, or whether, assuming such right to exist, it is not bounded by the provisions of rule 7, order XLVII, of the Code of Civil Procedure. We may note that the appeal before us does not purport to be preferred under order XLIII, rule 1 (*w*), of the Code of Civil Procedure, but under section 75 (3) of the Provincial Insolvency Act, No. V of 1920, the leave of the District Court having been obtained for the purpose. We think, however, in dealing with an appeal of this sort, we ought in any case to be guided by the principles laid down in the Code of Civil Procedure. We are satisfied that the first order passed by the District Judge on the appeal before him was a mistaken and unfortunate order and that it was proper in the interests of justice that he should proceed to hear and dispose of the appeal before him on the merits, as he is anxious to do. He will have full jurisdiction in the matter when he comes to hear the appeal, and if in his opinion there has been anything unsatisfactory in the procedure of the Subordinate Judge sitting as a trial court, that is a matter which can be considered and gone into at the hearing of the appeal. We are further satisfied that under the Code of Civil Procedure this order granting a review of judgment could not be questioned under any of the provisions of rule 7 of order XLVII of that Code. On the whole, the conclusion we come to is that the order in question granting review is not one with which we ought to interfere.

The result is that we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Reves and Mr. Justice Stuart

BHIKHARI DAS (PLAINTIFF) v. ABDULLAH (DEFENDANT).* 1922 May, 2

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 11A—Limitation—Decree for possession—Resistance offered to decree-holder by third party—Suit for declaration that property is subject to decree.

Held that article 11A of the first schedule to the Indian Limitation Act, 1908, applies to a suit brought by a decree-holder for a declaration that certain specific property, possession of which was refused by the occupant, was covered by his decree. *Sardhari Lal* v. *Ambika Pershad* (1) and *Ganpat Rai* v. *Husaini Begam* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Hariloans Sahai* and Munshi *Panna Lal*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondent.

REVES and STUART, JJ.—The plaintiff appellant obtained a decree in 1913 for possession of certain property against certain persons and in execution of that decree he got possession of the major portion of the property in suit; but he was resisted by one Abdullah, who was not a party to the decree, on the ground that the premises in the possession of Abdullah were his own property and were not covered by the decree. The plaintiff applied to the executing court for possession against Abdullah but that court by an order dated the 31st of July, 1915, passed under order XXI, rule 99, upheld Abdullah's contention. This suit was brought in 1919 for possession of the property in Abdullah's possession. It has been dismissed on the ground that it was barred by limitation under article 11A of the first schedule to the Limitation Act. In appeal before us it has been argued that that article does not apply to a suit brought by a decree-holder. This point seems to us to be covered by *Sardhari Lal* v. *Ambika Pershad* (1). In that case their Lordships of the Privy Council held that the opening words of article 11 of the Limitation Act No. XV of 1877, namely "a person against whom" included the decree-holder. Article 11A contains words to the same effect and, therefore, the ruling of the Privy Council is equally applicable to this new article. This view was taken in this Court in *Ganpat Rai* v. *Husaini Begam* (2). Rule 103 of order XXI only enables a party other than a judgment-debtor against whom an order is made under rule 98 or 99 or 101 to

* Second Appeal No. 1461 of 1920, from a decree of Ganga Sahai, First Additional Judge of Aligarh, dated the 10th of July, 1920, modifying a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 18th of March, 1920.

(1) (1888) I. L. R., 15 Calc., 521.
(2) (1920) 19 A. L. J., 53.

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institute a suit to establish the right which he claims to the possession of the property. That, however, does not touch the question as to the period of limitation within which such a suit must be brought. In our opinion that is settled by article 11A of the present Limitation Act. In this view the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

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May, 3.

CHATARPAL SHARMA (PLAINTIFF) *v.* JAGANNATH DAS (DEFENDANT).*

Act No I of 1877 (Specific Relief Act), section 54—Injunction—Patent medicine— Sale by defendant of a medicine got up in such a manner as to lead customers to believe that they were buying a different medicine previously put on the market by the plaintiff.

Plaintiff had, for a number of years, been doing a large business in a medicine which he called "Sudha Sindhu," said to be a specific for cholera, asthma, cough and diarrhœa. This was sold in a bottle wrapped in two labels, an inner and an outer, the designs for which had been registered by the plaintiff Defendant, apparently with the object of cutting into plaintiff's trade, produced a medicine which he called "Piyus Sindhu," also said to be a specific for the same diseases, and packed his medicine in bottles of the same size as the plaintiff's bottles, with an outer and an inner label, the labels being of such a design that, although when placed side by side with the plaintiff's labels certain differences were readily discernible, illiterate persons, such as formed the bulk of the plaintiff's customers, would most probably be led to believe that they were buying the plaintiff's medicine, which they knew, and which they intended to buy.

Held on suit by the proprietor of the "Sudha Sindhu" for an injunction, that, though there could be no injunction granted in respect of the name "Piyus Sindhu" or the use of a bottle of the particular size, the plaintiff was entitled to an injunction restraining him from selling or offering for sale his medicine "Piyus Sindhu" in any outside wrapper or inside label or with any instructions for use or advertisements in any form, calculated or intended to pass off or enable others to pass off such medicine as and for the medicine of the plaintiff.

Held also that the plaintiff was nonetheless entitled to an injunction because his medicine was, in the estimation of allopathic doctors, of no very great curative value, or because, though an allopathic medicine, it was described by a Sanskrit name.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *B. E. O'Conor* and Munshi *Narain Prasad Ashthana*, for the appellant.

Dr. *Surendra Nath Sen* and Dr. *Kailas Nath Katju*, for the respondent.

MEARS, C. J., and BANERJI, J.—On the 19th of February, 1918, the plaintiff Chatarpal Sharma, a tradesman in Muttra, brought a suit against Lala Jagannath Das, also a tradesman, and also in Muttra. The plaintiff set out that

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* First Appeal No. 38 of 1920, from a decree of Piari Lal Katara, Subordinate Judge of Muttra, dated the 7th of January, 1920

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for more than twenty years he had been selling medicine under the name of Sukh Sancharak Co., and that he had put upon the market a medicine by the name of "Sudha Sindhu," that the medicine had borne that name for more than twenty years, and that for more than eight years the medicine had been sold in an uniform get-up, that is to say, the bottle had always been the same size, there had been the same inner label on the phial, there had been the same external label, being the outer wrapper on the packet. Enclosed in the packet were directions and 'puff' advertisements and description of diseases. He also said that in the year 1908 he had registered the labels as his trade mark. He further said in his plaint that he had what he described as "Agents" in the villages in India, Burma, Ceylon and elsewhere, to the number of 15,000. He gave evidence in support of all these matters, and he showed that for some years, at all events, about 100,000 bottles of this medicine had been distributed throughout this country every year. He complains of the conduct of the defendant who, he said, had imitated his labels and get-up of his medicine with a view, no doubt, to cut into and enjoy some part of this very prosperous trade of the plaintiff, which a year or two ago had brought him in some Rs 14,000 profit annually. The plaintiff alleged that by reason of the similarity of the labels, of the wording on the labels, of the colouring, of the spacing, in fact which in general is called "the get-up," the defendant had put upon the market an article so like that which the plaintiff was selling and which had become associated with his name that it was calculated to mislead, and could be passed off as and for the goods of the plaintiff. He alleged that that conduct constituted an actionable wrong and entitled him to an injunction.

Taking the article as it is handed over from the seller to the buyer, one finds that in both instances the packet is cylindrical and approximately, indeed almost identically, of the same size. In each case the foundation of the paper of the outer cover is white. The registered label of the plaintiff has a peacock-blue background. The label of the defendant is green and there is thus a distinct and most appreciable difference in the general background colours. At the end of each packet and acting as seals for the fastening, the plaintiff has at one end the name of the medicine "Sudha

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Sindhu ' in English. The defendant also has a label similar in appearance but with a green background and with the name of his medicine " Piyus Sindhu". Both have at the other end the name of the medicine in Hindi. Samples of other medicines sold by the defendant have been produced and at the bottom of such packets there is not the name of the medicine but the representation of a rising sun which is said to be the trade mark of the defendant.

Turning now to the text and the general conformation of the outer labels, we find in both cases they are the same size and have ornamental tracery running all round the outside along the outer edge. Both labels give prominence to the name of the medicine. Both names are printed in red ink with an outline of white, and on the right-hand side the medicine of the plaintiff is described as " a good remedy for cholera, asthma, cough and diarrhœa." On the left-hand side of the defendant's label the description is " an invaluable remedy for cough, cholera, diarrhœa and asthma". In the centre of each label there appears what are said to be photographs of the plaintiff and the defendant, respectively. The background of the plaintiff's (in the copy furnished to us) is very dark. The background of the defendant's is white Transversely across the chest, in each case, is the signature of the plaintiff and the defendant. In tablets below there is white printing on a red ground in each, and underneath it white printing on a dark blue ground and the dark blue is precisely the same colour in each case. Inside the red tablet with the blue printing of the word " Sudha Sindhu " there appears an unnecessary white dot, probably a printer's error. It is clearly marked and clearly defined. In the big label of the defendant that dot is not reproduced, but when we come to examine the similar inside labels we find that that dot in the " Sudha Sindhu " label has by some extraordinary coincidence been incorporated into the defendant's label. Wrapped round each bottle is a smaller but similar label. At the top of the plaintiff's label are the words " this whole label is our trade mark, registered No. 13". At the top of the defendant's is " this whole design is our registered trade mark No. 16."

We have already pointed out the singular circumstance that the misprint which occurs in the " Sudha Sindhu " is reproduced in the " Piyus Sindhu ". " Sudha Sindhu " is

described as "good remedy for cholera, asthma, cough and diarrhœa". "Pipus Sindhu" is described as "good remedy for cough, cholera, colic, asthma and diarrhœa". We attach importance to the fact that the defendant a year or two before the action used the very words "good remedy for" which had been on many thousands of the plaintiff's bottles for many years past. Immediately under those words in the plaintiff's label is the name of the firm "Sukh Sancharak Co., Mutra," and in the same place are to be found in the defendant's labels the name of the defendant's firm. In each case are words in Hindi, again showing the same characteristics of colouring, red, white and blue as are in the plaintiff's label. No one comparing these two sets of labels can have any reasonable doubt that the person, who a year before the commencement of this action brought the defendant's labels into existence, had the plaintiff's labels before him and copied them as accurately as he dared to do.

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The question is whether these labels, connected as they are with certain literature, to which we shall refer in a moment, constitute so close an imitation of the well-known get-up of the plaintiff's as to be calculated to deceive purchasers into the belief that the defendant's goods are those of the plaintiff's. Inside the outer covering of each of these medicines, there are directions and advertisements. They are of the usual florid character which are used in patent medicines. But the point of importance is this, that when the defendant is describing all the virtues which his medicine possesses, we find that he is taking in many cases word for word the advertisements which the plaintiff had previously drafted years before. The actual text of the two has been transcribed for our use into the Roman character and has been read to us. Two persons sitting down independently to describe coughs, asthma, diarrhœa, etc., would no doubt give a generally similar description, but a comparison of the text shows beyond doubt that the defendant copied the text of the plaintiff, being careful, however, to make occasional transpositions. Now what, in our view, would be the effect of all these similarities amongst the purchasers to whom the plaintiff's medicine is usually sold? The bulk are illiterate. Indeed, it is said that certainly not one person in twenty who is a customer of the plaintiff's would be able to read that which is upon the labels. Therefore he must necessarily go

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by the general comparison of the labels, of the contents and of the size of the bottle. As regards the size of the bottle, it is of a usual size and one in which neither the plaintiff nor the defendant can claim any special property. Many of these kinds of medicines are sold in bottles of this size and Mr. *O'Conor* does not contend that he can require the defendant to alter the size of his bottle.

We are of opinion that this medicine of the defendant, encased as it is in the way we have described, could be readily passed off so as to deceive the ordinary village customer into the belief that he was purchasing the medicine of the plaintiff. We have no doubt that it was with that very object that the defendant arranged for the get-up of his goods and came into the market as against the plaintiff. The defendant did not go into the witness box. He preferred to take his chance that the plaintiff would not give sufficient evidence to bring this matter within the recognized standards by which these cases have to be decided. Singularly enough he succeeded before the Subordinate Judge who did not give to this case that degree of thought and care which he should have done. The learned Judge looked at the matter from the wrong point of view—he focussed attention on the points of difference. He did not consider the number of similarities, nor did he consider that in passing off you must be guided very greatly by first impressions as to general similarity. The Judge enumerated the points of difference and then said the points of resemblance were quite immaterial. We think, on the contrary, that the points of resemblance are the principal matters, and had they been carefully considered in relation to the facts as to the trading of the plaintiff and defendant, no one could have come to any other conclusion than that the defendant deliberately copied the labels of the plaintiff and the get-up of his goods. We think that the copyist was so successful in his attempt as to bring the defendant's goods within that class of cases in which the proper remedy of the plaintiff is an injunction.

Dr. *Katju* has referred us to the 20th paragraph of the written statement in which the point is taken that inasmuch as this medicine does not do all that is claimed for it and is of an ordinary allopathic nature, passed off under a Sanskrit name, that the plaintiff is entitled to no protection. Now

there is no doubt that the court must not assist in the perpetration of a fraud. There is equally no doubt that if any particular business could be shown to be a fraudulent business or one forbidden by law, or one which the public policy of the law was to prevent, then in those cases the proprietor could not claim the protection of the court. All patent medicine vendors puff their goods extravagantly. No one believes that these advertisements and claims are literally true; but at all events there is proof that this medicine of the plaintiff has been in the market for twenty years and is used by many thousands of people. The defendant went to the expense of calling an eminent Civil Surgeon who spoke about the properties and proportions of the various compounds which this medicine is said to contain, and although he thought that the strength of a particular dose was such as to be of very little medicinal value, there certainly is no condemnation of the preparation such as would justify one in thinking that the preparation was harmful. In these circumstances, we are of opinion that the business carried on by the plaintiff which he seeks to have protected cannot come within that passage from the Laws of England which Dr. *Katju* has read to us.

The question is, in what form the injunction is to go. Mr. *O'Conor* has said that, assuming the labels were entirely distinct from that of the plaintiff's, as, for instance, black printing on a white ground, he could not object nor could he lay claim to restraining the defendant from the use of the words "Piyus Sindhu", and if the defendant honestly wishes to put this preparation on the market and at the same time to be free from the suspicion of wishing to capture the plaintiff's trade by unfair means, that is the easiest way out of the matter, but at all events he must be restrained by an injunction and he must understand that if he disobeys the injunction, he must be committed to prison for contempt of court. It is, therefore, ordered that the defendant be restrained from selling or offering for sale his medicine "Piyus Sindhu" in any outside wrapper or inside label or with any instructions for use or advertisements in any form, calculated or intended to pass off or enable others to pass off such medicine as and for the medicine of the plaintiff.

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This appeal, therefore, must be allowed with costs, and an injunction must issue to the defendant in the above terms. We make no order for an account.

Appeal allowed

REVISIONAL CRIMINAL.

Before Mr Justice Lindsay

1922 *May*, 8.

NIZAM-UD-DIN KHAN v. MUHAMMAD ZIA-UL-NABI KHAN *

Criminal Procedure Code, section 125—Security for keeping the peace—Grounds for cancellation of bond

The only ground on which a District Magistrate can cancel a bond for keeping the peace or to be of good behaviour under section 125 of the Code of Criminal Procedure is that something has supervened since the date of the first court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity for keeping the accused person under bond. A District Magistrate cannot use the section as if he were sitting as a court of appeal nor is he justified in passing an order under the section merely because he takes a different view of the evidence which has been submitted to the court of first instance.

Banarsi Das v. *Partab Singh* (1) and *Emperor* v. *Shankar Lal* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *J. M. Banerji*, for the applicant.

The Assistant Government Advocate (Mr *R. Malcomson*), for the Crown.

LINDSAY, J.—These two applications in revision arise out of certain proceedings which were taken in the court of an Assistant Magistrate of the Agra district under section 107 of the Code of Criminal Procedure. It was apparently reported to the Magistrate that two persons, namely, Nizam-ud-din Khan and Muhammad Zia-ul-Nabi Khan were on very bad terms and were likely to commit a breach of the peace. The report was made to the Magistrate with a view to both parties being bound over to keep the peace. The parties, it appears, are relations.

Separate proceedings were instituted against each of the parties, and in the result the Assistant Magistrate bound over both parties for a period of one year.

Zia-ul-Nabi Khan made an application to the Officiating District Magistrate of Agra under section 125 of the Criminal Procedure Code and that officer passed an order cancelling the order of the Assistant Magistrate by which Zia-ul-Nabi Khan was bound over to keep the peace.

* Criminal Revision No. 93 of 1922, from an order of Aimuddin, Officiating District Magistrate of Agra, dated the 24th of October, 1921

(1) (1912) I. L. R., 35 All., 103.

(2) (1919) I. L. R., 41 All., 561

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NIZAM-UD-DIN KHAN v. MUHAMMAD ZIA-UL-NABI KHAN

The case of Nizam-ud-din Khan, the other accused, came up before the permanent District Magistrate at a later stage under section 125 of the Code of Criminal Procedure. So far as Nizam-ud-din Khan was concerned, the District Magistrate passed an order refusing to interfere with the order passed by the Assistant Magistrate.

I have now before me two applications in revision, both presented on behalf of Nizam-ud-din Khan. As regards his own case Nizam-ud-din Khan contends that he was not liable, on the evidence offered at the trial court, to be bound over to keep the peace. As regards the case of Zia-ul-Nabi Khan the contention is that the order passed by the Officiating District Magistrate cancelling the bond under the provisions of section 125 of the Code of Criminal Procedure was an illegal order. Notice has been issued to Zia-ul-Nabi Khan in this case to show cause why the order under section 125 should not be set aside.

Dealing first with the case of Nizam-ud-din Khan, which is case No. 94 of 1922, I have examined the evidence which was led in the court of the Magistrate, and, after perusal of that evidence which was not rebutted by any evidence on the part of Nizam-ud-din Khan himself, I am satisfied that there was ample ground justifying the order passed by the Magistrate. I may further observe that when Nizam-ud-din Khan was called upon to show cause, he expressed his willingness to be subjected to a bond. So much for the case No. 94. The application of Nizam-ud-din is dismissed.

As regards the other case, in which Zia-ul-Nabi Khan is the accused (Case no. 93 of 1922), it appears to me that on the authorities of this Court the order passed by the Officiating District Magistrate is an illegal order. I may refer to two cases, one of which is that of *Banarsi Das* v. *Partab Singh* (1). In that case it was held that a District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of the first class Magistrate on the facts. If he considers the order to be wrong on the merits, he can exercise his revisional powers and submit the record to the High Court. But the cancellation of bonds contemplated by section 125 can only be on the

(1) (1912) I. L. R., 35 All., 143.

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ground that the bonds are no longer necessary. This case was followed in another case, that of *Emperor* v. *Shankar Lal* (1). I agree with this interpretation of section 125 of the Criminal Procedure Code. It appears to me that the only ground on which a District Magistrate can cancel a bond for keeping the peace or to be of good behaviour is that something has supervened since the date of the first court's order which satisfies the District Magistrate that in view of the facts since come to light there is no longer any necessity for keeping the accused person under bond. I do not think section 125 can be used by a District Magistrate as if he were sitting as a court of appeal or that he is justified in passing an order under the section merely because he takes a different view of the evidence which has been submitted to the court of first instance. If he thinks that the order of the first court is not maintainable on the evidence as presented, his duty is not to pass an order under section 125 but to refer the case to the High Court on its revisional side. I, therefore, set aside the order of the Officiating District Magistrate dated the 24th and restore the order of the Assistant Magistrate which bears the date 17th of September. 1921.

1922
May, 4.

Before Mr Justice Lindsay and Mr. Justice Gokul Prasad.

SHEO NARAIN (PLAINTIFF) *v.* BALA RAO (DEFENDANT).*

Act (Local) No II of 1901 (*Agra Tenancy Act*), *section* 201 (3)—*Suit for profits—Presumption—Joint Hindu family*

The presumption of law provided for by section 201 (3) of the Agra Tenancy Act, 1901, is none the less applicable because the parties to a suit for profits may be members of a joint Hindu family.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondent.

LINDSAY and GOKUL PRASAD, JJ. :—This appeal and the connected second appeal No. 24 of 1921 arise out of suits for profits brought by the plaintiff appellant against his brother, lambardar, defendant. The suits were for profits of two mahals for the years 1323, 1324 and 1325. The defendant pleaded in answer that he and his brother were members of a joint Hindu family and that such a suit was not maintainable.

* Second Appeal No. 23 of 1921, from a decree of H J Bell, District Judge of Jhansi, dated the 4th of June, 1920, modifying a decree of Thakur Phul Singh, Assistant Collector, first class, of Orai, dated the 12th of January, 1920.

(1) (1919) I L. R , 41 All , 651.

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The first court came to the conclusion that the parties were divided in status, and decreed the claim of the plaintiff in part for the periods in suit.

On appeal the learned Judge has come to the conclusion that the parties were joint in the year 1323 Fash and has dismissed the claim for profits for that year. The names of the parties to the suit are entered on a moiety share in each of the two mahals and having regard to the view taken of section 201 (3) of the Tenancy Act by this Court, the claim of the plaintiff, whose name was entered on a moiety of the property, ought to have been decreed. All that the learned Judge says about the aspect of the case is that "the irrebutable presumption of section 201(3) of the Tenancy Act ordinarily applicable under the decision of I. L. R., 32 All., 779, does not apply": or, in other words, he seems to think that such a presumption is not to be applied in the case of a joint Hindu family. But he forgets that all that this presumption results in is to prevent persons from pleading that the family is a joint Hindu family as against the entries in the khewat. So far as the Revenue Courts are concerned these entries are deemed to be true records for the purposes of suits under Chapter II of the said Act.

In our opinion the decree of the lower appellate court is based on a misapprehension of the effect of section 201 of the Tenancy Act. In our view the decree of the first court was correct and has been wrongly interfered with. We therefore allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts.

Appeal allowed.

Before Mr Justice Lindsay and Mr Justice Gokul Prasad

MUHAMMAD FATIMA (DEFENDANT) v. MUHAMMAD MASHUQ ALI AND ANOTHER (PLAINTIFFS) *

1922

May, 4.

Act No. III of 1907 (Provincial Insolvency Act), section 16 (2)—Insolvency—Vesting of property in receiver—Suit by receiver for declaration of title

All property such as may be acquired by or have devolved on the insolvent after passing of an order of adjudication and before his discharge, forthwith vests in the court or receiver and becomes divisible amongst the creditors in accordance with the provisions of sub-section (2), clause *(a)*, of section 16 of the Provincial Insolvency Act. The receiver is entitled to sue for a declaration of title simply and need not claim actual possession.

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* Second Appeal No. 1624 of 1920, from a decree of V. B. G. Hussey, District Judge of Moradabad, dated the 19th of May, 1920, confirming a decree of Lalta Prasad Johri, Subordinate Judge of Moradabad, dated the 10th of January, 1920.

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MUHAMMAD FATIMA v. MUHAMMAD MASHUQ ALI.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *S. A. Haidar*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

LINDSAY and GOKUL PRASAD, JJ. :—Although we do not agree with the reasons given by both the courts below in support of their judgments, we are nevertheless of opinion that the decree in favour of the plaintiff is substantially correct. The plaintiff is receiver in insolvency of one Abdur Rauf who was declared insolvent on the 13th of July, 1915. More than two years after the adjudication order, a sister of the insolvent, Musammat Musharraf-un-nissa, died and Abdur Rauf, as one of her legal heirs, became entitled to a two-ninths share of her estate.

It appears that after the death of Musharraf-un-nissa, the appellant before us managed in some way or other to have a mutation order made in her favour. It seems that she put forward a will which she said had been executed in her favour by Musharraf-un-nissa who was her aunt.

The receiver brought this suit asking for a declaration that a two-ninths share of the estate of Musharraf-un-nissa became the property of the insolvent, Abdur Rauf, on the lady's death and that it was saleable in satisfaction of the amount due to Abdur Rauf's creditors. It was, therefore, prayed that it might be declared that the name of Muhammad Fatima had been entered in the revenue papers wrongly and contrary to facts.

Both the courts have found that the story of the will in favour of Muhammad Fatima is untrue.

A legal plea was raised in both the courts below, namely that the plaintiff was under an obligation to sue for possession and could not seek mere declaratory relief under the provisions of section 42 of the Specific Relief Act. Both the courts below overruled this contention. The learned Judge of the first court seems to have thought that because the property of an insolvent vests in the receiver, that is the same thing as the receiver's actually being in possession of the property. This view, of course, has not been supported. The learned Judge of the court below held, however, that a declaratory decree was permissible inasmuch as the declaration which was sought for would enable the receiver to sell or mortgage the property for the benefit of the creditors

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MUHAMMAD FATIMA v. MUHAMMAD MASHUQ ALI

In our opinion the receiver was entitled to ask for declaratory relief and to obtain it. Under the provisions of the Provincial Insolvency Act (No. III of 1907) which were in force at the time the inheritance opened, all property such as may be acquired by or devolved on the insolvent after the passing of an order of adjudication and before his discharge, forthwith vests in the court or receiver and becomes divisible among the creditors in accordance with the provisions of sub-section (2), clause (a), of section 16. In these circumstances we are satisfied that the plaintiff as receiver was entitled to the relief which he claimed in paragraph 6, clause (a) of the plaint. We do not think that it can reasonably be argued that the receiver was under an obligation to bring a suit for physical possession of the insolvent's property. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr Justice Ryves and Mr Justice Stuart

SHAMBHU (DEFENDANT) v. KANHAYA (PLAINTIFF) AND KANHA (DEFENDANT).*

1922

May, 4.

Minor—Guardian ad litem—Duration of appointment—Authority of guardian not confined to original suit

Where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor *Jwala Dei* v. *Pirbhu*, (1) followed

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. P. Dube*, for the appellant.

Munshi *Narain Prasad Asthana*, for the respondent.

RYVES and STUART, JJ.:—The point that arises in this appeal is fully covered by authority. The suit was brought by a mortgagee on the foot of a mortgage to recover the loan. It was instituted against the mortgagor who executed the mortgage and his minor son. After attempts had been made by the plaintiff to get various persons appointed guardian *ad litem* to the minor, the Nazir of the court was ultimately appointed. The suit was heard, evidence was given and it was ultimately decreed in favour of the plaintiff against both the father and the son. Thereafter an appeal

* Second Appeal No. 1513 of 1920, from a decree of T. K. Johnston, District Judge of Agra, dated the 27th of May, 1920, confirming a decree of Bans Gopal, Subordinate Judge of Muttra, dated the 13th of January, 1919

(1) (1891) I. L. R., 14 All., 35

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was presented to the District Judge by one Bhagwanji on behalf of the minor. He was not the guardian *ad litem* and had never applied to be made guardian. On the appeal coming before him, the learned District Judge refused to hear it on the ground that there was no valid appeal before him. He held that the Nazir having been appointed guardian *ad litem*, his authority must be held to continue as long as the *lis* continued and that until he had been removed from the guardianship by the court, he and he only was competent to file an appeal. He, therefore, dismissed the appeal. It is from this decree dismissing the appeal that this second appeal was brought, and it is urged that the authority of the Nazir ended with the decree of the first court and that thereafter it was open to the minor defendant to appeal through his next friend. In *Jwala Dei* v. *Pirbhu* (1), a Bench of this Court decided that where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it was made, unless and until it was revoked by the court. In *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharam* (2), the same proposition was laid down. That case was followed by a Divisional Bench of this Court in *Bawan Das* v. *Bishnath* (3). These three cases were referred to and followed by a single Judge of this Court in *In the matter of the application of Sukhdeo Rai* (4). We see no reason to differ from this consistent authority. Our attention has been called to *Bhagwan Dayal* v. *Param Sukh Das* (5). In that case, however, this point did not arise and was not considered. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr Justice Gokul Prasad and Mr Justice Stuart.

1922

May, 5.

KUNDAN LAL (DEFENDANT) *v.* KHEM CHAND AND OTHERS (PLAINTIFFS).*

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 22—*Insolvency—Claim to property advertised for sale by the receiver as property of an insolvent—Suit—Application under section* 22

Held that a person claiming as his own property which has been advertised by the receiver as the property of an insolvent is not precluded

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* Second Appeal No 28 of 1921, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 11th of May, 1920, reversing a decree of Ganga Nath, Munsif of Mainpuri, dated the 24th of January, 1919

(1) (1891) I. L. R., 14 All., 35.
(2) (1898) I. L. R., 22 Mad., 187.
(3) Weekly Notes, 1899, p. 203.
(4) (1905) 2 A. L. J., 469.
(5) (1916) I. L. R., 39 All., 8.

from suing for a declaration of his title thereto by reason of his having made an application with the same object apparently under section 22 of the Provincial Insolvency Act, 1907, where as a matter of fact such application, though purporting to be made under section 22, was not made within the time prescribed *Pita Ram* v. *Jujhar Singh* (1), distinguished

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KUNDAN LAL v. KHEM CHAND.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Girdhari Lal Agarwala*, for the appellant.

Babu *Satia Nath Mukerji*, for the respondents.

GOKUL PRASAD and STUART, JJ :—This appeal arises out of a suit brought by Khem Chand and others who had purchased certain property on the 18th of July, 1908, from one Pokhar Prasad. Pokhar Prasad was adjudicated an insolvent on the 30th of November, 1917; Kundan Lal was appointed receiver. Kundan Lal advertised the property, purchased by Khem Chand and Chuni Lal from Pokhar Prasad in 1908, for sale as the property of the insolvent. Khem Chand and Chuni Lal then applied to the District Judge under the provisions of section 22 of Act III of 1907 for an order setting aside the proposed sale and a declaration that the property was theirs. This application was dismissed on the ground that it had not been filed within 21 days of the act complained of. Khem Chand and Chuni Lal subsequently, with the permission of the District Judge, instituted a suit against the receiver and the insolvent for a declaration that the property in question belonged to them. The suit has been decreed in their favour on the merits. In second appeal it is urged on behalf of the receiver that the suit as brought by the plaintiffs must fail because they elected to pursue their remedy under section 22 and their claim had been decided against them and that therefore they could not file a separate suit with the same object. Reliance is placed on the decision in *Pita Ram* v. *Jujhar Singh* (1), but accepting the law laid down in that decision there is no force in this appeal. In order to debar a person from taking his remedy in such a case by way of a regular suit it is necessary to establish that he has in effect pursued a remedy under section 22. Here the plaintiffs did not pursue their remedy under section 22. Their remedy was by an application made within 21 days from the date of the order or decision complained of. They made no application within 21 days from the date of the order or decision complained of. It is true they made an applica-

(1) (1917) I. L. R., 39 All., 626.

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KUNDAN LAL v. KHEM CHAND.

tion after 21 days, but that application, although purporting to be an application under section 22, was from its very nature not an application under section 22. We therefore hold that in this case the plaintiffs did not elect to pursue their remedy under section 22 and inasmuch as there was no determination on the merits before this suit was instituted, they were within their rights in seeking their remedy by a regular suit. We therefore dismiss this appeal with costs.

Appeal dismissed.

Before Mr Justice Piggott and Mr Justice Walsh.

1922
May, 6.

MUFTI ALI JAFAR AND ANOTHER (PLAINTIFFS) *v.* FAZAL HUSAIN KHAN AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *section 92—Suit relating to a trust created for public purposes of a charitable or religious nature—Provisions of section 92 compulsory, where applicable—Act No. I of* 1877 *(Specific Relief Act), section 42—Suit for a declaration merely.*

Where circumstances are alleged to exist in which a suit relating to an express or implied trust created for public purposes of a charitable or religious nature, may be instituted under the provisions of section 92 of the Code of Civil Procedure, the suit must be instituted in accordance with those provisions. It is not open to the would-be plaintiffs to evade the requirements of the Code by framing their suit as one under section 42 of the Specific Relief Act, 1877.

THE facts of this case are fully set forth in the judgment of PIGGOTT, J.

Dr. *Surendra Nath Sen* and Maulvi *Mukhtar Ahmad*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

PIGGOTT, J :—It is impossible to understand the questions raised by this first appeal without going back to the facts of a previous litigation, determined by a decree of this Court dated the 20th of March, 1914, and a subsequent compromise. One Ghazanfar Husain Khan, a Shia gentleman residing at Jaunpur, executed, shortly before his death, a deed of endowment by which he constituted a trust for public purposes of a charitable and religious nature and appointed three trustees for the management of the said trust. The heirs-at-law of the deceased founder of the trust brought a suit against the trustees contesting the validity of the entire transaction. The eventual result was that the deed of endowment was declared invalid and the heirs-at-law of Ghazanfar Husain Khan were found to be the rightful owners as regards the larger part of the property affected by the deed of endowment,

* First Appeal No. 393 of 1919, from a decree of Pyare Lal Chaturvedi, Second Additional Subordinate Judge of Jaunpur, dated the 15th of March, 1919.

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but the decree was affirmed in respect of a certain portion of the property affected. The trustees filed an application for leave to appeal to His Majesty in Council and obtained from this Court the necessary certificate entitling them to maintain such an appeal. While this was pending, however, a compromise was effected between the parties to that litigation, that is to say, between the heirs-at-law of Ghazanfar Husain Khan on the one side and the trustees under the deed of endowment on the other. Virtually the parties agreed to abide by the division of the disputed property effected by the decree of this Court. There remained, however, for determination the question of the liability of the trustees for costs of the litigation and also for the mesne profits claimed by the plaintiffs in that suit. The trustees were of opinion that they could not meet these claims and could not save any portion of the trust property without making alienations of the said property. They disposed of the matter by selling a small portion of the trust property to the plaintiffs and mortgaging the remainder with possession for a period of years. The net result of the transaction was that the whole of the property covered by the trust passed for the time being into the hands of the heirs-at-law of Ghazanfar Husain Khan, but subject to this condition that, after a stipulated period of years, the bulk of the property which (according to the decision of this Court) had been made the subject-matter of a valid endowment, returned to the trustees to be used for the purposes set forth in the deed of trust. This litigation having been thus concluded, the present suit was instituted on the 20th of September, 1917. The plaintiffs are two gentlemen belonging to the Shia community residing at Jaunpur. They claimed to sue as beneficiaries under the trust, in a representative capacity, on behalf of all the other members of their community in that place who were equally interested with themselves in the administration of the trust. They have not obtained the permission of the Advocate General, or of the proper officer appointed in this behalf in these provinces, to entitle them to maintain their suit under section 92 of the Code of Civil Procedure; but they have obtained from the trial court permission under order I, rule 8, of the Civil Procedure Code to maintain their suit in a representative capacity. The allegations made in the plaint are of a most serious character and the object of the suit, on the very face

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of it, was to reverse the whole result of the previous litigation and, if possible, to recover for the purposes of the public trust in question the whole of the property covered by Ghazanfar Husain Khan's original deed of endowment. According to these plaintiffs the trustees appointed by that deed of endowment had been guilty of a series of breaches of trust, all the more objectionable in character because they had been cloaked by a pretence of honest zeal in the support of the endowment. It was suggested that the trustees were from the first in collusion with the heirs of Ghazanfar Husain Khan; that they did not honestly defend the suit brought by the said heirs, either in the trial court or in this Court; that the compromise which they eventually entered into was a dishonest one and that, in any case, the alienations effected by sale and mortgage in accordance with the terms of that compromise were outside the power of the trustees and the making of them constituted a breach of trust on the part of the latter. The trial court has in effect held that the plaintiffs are not entitled to re-open any of the questions determined by this Court's decree of the 20th of March, 1914, and that there seems no reason for re-opening those questions. It has come to a clear finding in favour of the trustees, that they were not in collusion with the plaintiffs in that litigation and that they defended the interests of the trust zealously and to the best of their ability. As regards the compromise, however, the court below has come to the conclusion that the trustees could not lawfully alienate by sale or by mortgage any portion of the trust property without the sanction of some competent court of civil jurisdiction, such sanction being necessary to represent and replace the permission of the Qazi required by the ancient principles of Muhammadan law. It has further been found that none of the orders passed by this Court, either the decree itself or the subsequent order upon the compromise, amounts to the granting of such permission. Upon the question raised, whether or not it was competent for himself to grant such permission retrospectively, the learned Subordinate Judge has doubted whether he could give such retrospective sanction, but has held that on the materials before him he could find no adequate grounds for doing so. The result has been that the greater portion of the plaintiffs' suit has been dismissed, but that they have been granted a decree which simply declares that the alienations of the trust

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property effected by way of sale and mortgage by two documents dated the 14th of June, 1915, executed in accordance with the compromise, are invalid. We have before us a petition of appeal by the plaintiffs, in which they challenge that portion of the decree of the trial court which has gone against them, upon a great variety of grounds. It would seem, however, that these plaintiffs have found themselves in difficulties over the maintenance of this litigation, upon which they had seen fit to enter ostensibly for the benefit of the entire community of which they are members. They have not found it possible to take the steps required by the rules of this Court in order to enable their appeal to be effectively prosecuted. They have not caused to be translated or printed any papers or documents on the record for the information of this Court and for the use of their counsel. The result is that the learned counsel representing the plaintiffs appellants has very properly and very candidly admitted to us to-day that he is not in a position to argue this appeal, because his clients have not furnished him with proper materials for doing so. We do not think it is necessary for us to go into this matter further. We have read so much of the judgment of the trial court as involves questions of law which are challenged in the plaintiffs' memorandum of appeal, and on the materials before us, it is quite sufficient for us to say that we find no valid reason for interfering with the decree of the court below on any of the grounds taken by the plaintiffs.

We have, however, before us a petition of cross objections, filed by the defendants trustees under order XLI, rule 22 of the Code of Civil Procedure, which contains one or two pleas going to the very root of this litigation. We have had the advantage of hearing these pleas satisfactorily argued on both sides and we have come to the conclusion that they must prevail and that the suit before us ought to have been entirely dismissed. The actual result of that suit as it stands is obviously most unsatisfactory. A certain deed of sale and a certain mortgage have been declared invalid. The trustees themselves, as parties to the deed of compromise, are probably not entitled to take any action upon this declaration in the way of challenging the right of the vendee or of the mortgagee in possession, even supposing that they feel inclined to do so. There is nothing in the decree of the court below which lays the trustees defendants under any legal obligation

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to take any action of any sort or kind, and there is no operative portion of the decree of which the successful plaintiffs can take out execution in order to obtain any result whatsoever. The consequence is that we have before us a decree which, without some further litigation, can lead to no practical consequences. Now this result has really been brought about by the frame of the plaint and the nature of the reliefs therein claimed. Those reliefs have obviously been framed in order to avoid the operation of section 92 of the Code of Civil Procedure. We entertain the gravest doubts whether a suit of this nature is maintainable at all, by two persons in the position of these plaintiffs, without previous action taken under section 92 of the Code of Civil Procedure. The proper view of that section seems to be that it is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. It must be remembered that sub-section (2) of this section contains a provision introduced for the first time into the Civil Procedure Code of 1908. The express prohibition (subject only to a proviso which does not concern us here) of any suit claiming any of the reliefs specified in sub-section (1) in respect of any such trust therein referred to, except in conformity with the provisions of that sub-section, was not to be found in the Code of Civil Procedure as it stood before the year 1908. It may be contended that it is perfectly possible, as the plaintiffs in the present case have attempted, to evade the provisions of section 92, sub-section (1), by judiciously framing the reliefs sought so as to avoid the operation of that sub-section. Even if the point is to be looked at from a purely technical point of view, it would seem that some effect must be given to the words of clause (*h*) of the sub-section, which refer to the granting of such further or other relief as the nature of the case may require. It seems very difficult to hold that the relief by way of declaration regarding the invalidity of the sale and mortgage in question in this suit could not have been brought within the provisions of section 92, sub-section (1), clause (*h*) above referred to. We are content, however, to dispose of the matter by carrying the question one step further. In their effort to avoid the provisions of sub-section (1) the plaintiffs have sought relief by way of a series of declarations. The declarations sought by them, and

certainly the only declarations actually decreed in their favour, are, as we have already pointed out, of such a nature that they are not calculated to produce any effect whatsoever, unless it be as a stepping stone to a fresh litigation. The position thus arrived at is contrary to the general principles governing the proper exercise of the discretion of a court in the matter of granting relief by way of declaration, even if it is not covered by the express provisions of section 42 of the Specific Relief Act. It is idle to contend that in the present suit the plaintiffs, assuming their allegations of fact to be true, could not have obtained effective relief by asking for the removal of these trustees, the appointment of other trustees, the vesting of the trust property in the new trustees so appointed, the taking of accounts from the defaulting trustees and perhaps the settling of a scheme for the management of the trust. Of course any trustees guilty of such gross breaches of trust as those alleged in this plaint would presumably be liable to be removed; but even if it was considered, after inquiry, desirable that the present trustees should continue in management of the trust property, the court would have been entitled upon a suit framed under section 92, sub-section (1), not merely to declare these transfers void, but to replace the trustees in possession of the property. If it be suggested on behalf of the plaintiffs that they are not affected by the proviso to section 42 of the Specific Relief Act because they could not, *in the suit as brought*, seek further relief than a mere declaration, being forbidden to do so by the provision of section 92, sub-section (1) of the Civil Procedure Code, it seems a sufficient answer to say that they ought to have availed themselves of those provisions and brought their suit in conformity with the same. For these reasons we are satisfied that the cross-objections must prevail. We dismiss the plaintiffs' appeal and, on the objections of the transferee defendants, we set aside the decree of the trial court and dismiss this suit altogether, with costs against the plaintiffs throughout.

WALSH, J.:—I agree, and I agree in substance with the learned Judge's decision. He is probably right in the conclusions which he has come to with regard to Muhammadan Law. Where he seems to have gone wrong is just this. The plaintiffs were in a dilemma. If the act of the trustees in entering into the compromise was a breach of trust because

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it offended against the general principle of the Muhammadan Law, which is the only reason which the learned Judge gives, he having found all the other allegations in their favour, the plaintiffs could not sue in respect of it except under section 92. If, on the other hand, it was not a breach of trust, the plaintiffs had no cause of action in respect of the compromise, so that, in either event, the plaintiffs were bound to fail.

I agree that suits with regard to trusts relating to public charities must either be brought under section 92 or they cannot be brought at all. The Court has to look at the substance and not the form. It is easy to see that the relief in this case was carefully framed so as not to come within the reliefs specified in section 92, and obviously a court would not lend itself to a dodge of this kind adopted by a litigant for the purpose of evading ancient and salutary provisions. As far as I can see, the main difficulty about section 92 is to bring certain classes of claims, which persons are forced to make, within its terms. A person who wants to keep out of it is clearly acting *mala fide*.

Appeal dismissed
Cross-objections allowed

Before Mr Justice Gokul Prasad and Mr Justice Stuart

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May, 5

RAM KISHAN RAI (DEFENDANT) *v.* CHHEDI RAI AND ANOTHER (PLAINTIFFS).*

Hindu law—Joint Hindu family—Liability of sons for father's debts—Bonds executed in renewal of previous bonds which were time-barred

Inasmuch as the Hindu law does not recognize any rule as to the extinction of claims by efflux of time, the sons in a joint Hindu family are not exempt from payment of bonds executed by their father merely because such bonds were given by way of renewal of other bonds which at the time of execution of the second set were barred by limitation *Narayanasami Chetti* v. *Samidas Mudali*, (1) followed

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellant

Pandit *Uma Shankar Baipai*, for the respondents.

GOKUL PRASAD and STUART, JJ.—This is an appeal by the defendant in a suit brought by the plaintiffs for recovery of the amount due to them on three bonds executed by the

* Second Appeal No. 59 of 1921, from a decree of Baijnath Das, District Judge of Ghazipur, dated the 10th of August, 1920, confirming a decree of Zamirul Islam Khan, Munsif of Ghazipur, dated the 15th of September, 1919.

(1) (1883) I. L. R., 6 Mad., 253

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father of the defendant. The only plea which has been argued in this Court is one of limitation. The case has been put before us by the learned vakil for the appellant in this form. He said that on the date the father executed the bonds which are now being sued upon, the earlier bonds in exchange for which the fresh bonds were executed had become barred by time and, therefore, there was no consideration for them and execution of these bonds would not be binding on the sons. There is no doubt whatever that the father was competent to execute the present simple bonds in lieu of time-barred debts. Against him the contract would have been a valid one under section 25, clause (3), of the Indian Contract Act. Moreover, the Hindu law does not recognize any rule as to the extinction of claim by the efflux of time, so that looked at from any point of view the bonds in dispute amounted to a valid contract made by the father. The father being dead, the sons were liable to pay the money which their father was bound to pay. This view finds support in *Narayanasami Chetti* v. *Samidas Mudali* (1). In our opinion the decree of the lower appellate court was a correct one. We accordingly confirm the decree of the lower appellate court and dismiss this appeal with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Piggott.

RUP NARAIN AND OTHERS (DEFENDANTS) v. BISHWA NATH SINGH (PLAINTIFF).*

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Act No. VII of 1870 (Court Fees Act), section 7 (v) (a) (b)—Court-fee—Suit by a member of a joint Hindu family to avoid a sale of ancestral property—Nature of relief to be asked for—Appeal.

In a suit where a member of a joint Hindu family seeks to avoid the effect of a private sale of ancestral property executed by other members of the family, the plaintiff need not ask for any other relief than possession of the property sold: he is not bound to ask for cancellation of the sale-deed; but if he does so he will have to stamp his plaint according to the full value of the property sold, unless he is permitted by the Court to amend his plaint.

The case of the defendants' appeal against a decree in favour of the plaintiff in such a suit is, however, different, and they are entitled to value their appeal, for the purposes of the Court Fees Act, under section 7 (v) (a) of the Act.

Raja Dhakeswar Prasad v. *Jiwa Chaudhry*, (2) distinguished.

THIS was a reference to the Taxing Judge on the question of the court fee payable on the plaint in a suit relating

* Stamp Reference in First Appeal No. 255 of 1920.

(1) (1885) I. L. R., 9 Mad., 293.

(2) (1918) 3 Patna L. J., 448.

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to a sale of joint ancestral property effected by certain members of a joint Hindu family, which the plaintiff (another member of the family) sought to avoid. The decree of the lower court being in favour of the plaintiff, a like question was also raised as to the court fee payable on the defendants' appeal. The facts of the case are stated in the office report.

Munshi *Kamalakant Varma*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondent

Office report:—The suit giving rise to this appeal was brought for cancellation of a sale deed and possession over the zamindari property involved in the said sale deed. The suit was valued at Rs 10,000, for purposes of jurisdiction but the court fee was paid on Rs. 1,000, being 10 times the Government revenue.

In view of a ruling reported in 3 P. L. J , 448, which lays down that in a suit for a declaration that the sale was invalid and for restoration of possession the plaintiff must pay an *ad valorem* court fee on the value of the whole estate sold and was not entitled to calculate an *ad valorem* fee on 10 times the amount of the Government revenue, the court fee payable on the plaint of this suit is to be calculated on Rs. 10,000 being the price of the property in dispute, which comes to Rs. 475. Deducting Rs. 75 already paid, there is a deficiency of Rs 400 payable by plaintiff respondent for the court below.

The court below decreed the plaintiff's suit subject to payment of Rs. 4,000 by the plaintiff to defendants Nos 1 to 6. The said defendants appealed to this Hon'ble Court with the prayer that the decree of the court below be set aside and that the plaintiff's suit be dismissed. They valued their appeal at Rs. 10,000 and paid Rs 75, the same court fee as was paid on the plaint. For the reasons stated above, the memorandum of appeal to this Court was deficiently stamped by Rs. 400.

The result is that the deficiency payable by defendants appellants for this Court is Rs. 400 and due from the plaintiff respondent for the lower court is Rs. 400.

Objection.—I dispute the correctness of the stamp report. The facts of the case reported in 3 P. L. J., 448, are entirely different and that case does not apply to the present case. There it was held by the Patna High Court

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that the relief for declaration was essential and that the plaintiff could not succeed without the declaration sought for.

In the present case the suit is by a Hindu co-parcener for possession of family property which belonged to him as much as to his father and brother on the ground that it had been transferred by the father and the brother without legal necessity. Such a suit is essentially a suit for possession. It is settled law that so far as limitation is concerned, such a suit is governed by the twelve years' rule of limitation, and not by the three years' rule under article 91, or by the six years' rule under article 120, of the Limitation Act, the reason being that in such a suit the main relief is one for possession, and it is not necessary for the plaintiff to obtain a declaration or cancellation of the sale deed, as a condition precedent for getting possession. In the present case itself the suit has been brought about eight years after the execution of the sale deed. Such a suit, therefore, falls under section 7, clause v, of the Court Fees Act. The ruling reported in 3 P. L. J., 448, therefore, does not apply. But if it be held to apply to a case like the present, then I contend that it does not lay down the law correctly.

PIGGOTT, J.—The Stamp Reporter has done no more than his duty in bringing this question forward, and the position taken up by him can be supported by strong arguments based upon the actual wording of the relevant clauses of the Court Fees Act. Nevertheless I cannot escape from the feeling that the line of action suggested does violence to the spirit of the Act. The plaintiff's case is that property of which he is the joint owner has been sold without his concurrence or authority, and the essential relief sought is recovery of possession upon such terms as the trial court may see fit to impose. The suit could have been framed as one for recovery of possession pure and simple; this is made the more apparent by the form of decree actually passed. The case of *Raja Dhakeswar Prasad Singh* v. *Jivo Chaudhry* (1) is not really in point. The sale in that case had been held by order of a public officer acting under statutory powers; it conveyed a good title to the purchaser unless it could be set aside on the ground of irregularity or fraud. "The declaratory relief sought was a necessary part of the

(1) (1918) 3 Patna L. J., 448

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suit " Here no relief by way of declaration has been granted; the decree passed is one for recovery of possession of property paying annual revenue to Government. It seems to me clearly against the intention of the Legislature that in a suit (or appeal) where the question in issue is the possession of land so assessed to revenue, the valuation of the property for purposes of court fee assessment should be otherwise than under section 7 (v) (*a*) or (*b*) of the Court Fees Act.

The difficulty remains that the plaint has been so worded that it falls within the purview of section 7 (iv) (*c*). This difficulty is a real one, and I do not think it can be got over unless the plaintiff can be permitted even at this stage to amend either—

(*a*) the plaint itself, or

(*b*) the statement of " the amount at which the relief sought is valued " in the said plaint.

I hold, therefore, that as against the plaintiff, who is the respondent to this appeal, the report must be affirmed. It will remain open to the said plaintiff to move the Bench hearing the appeal for leave to amend either the plaint or the valuation as above suggested. I would, however, warn him that he would do well to present himself at the hearing with the money necessary to make up the reported deficiency in his hand: if he is refused leave to amend, he may be required to make good the deficiency before he is heard on his petition of cross-objections.

The position of the appellants is different. Even on the principle suggested by the Stamp Reporter, the report is unjust to them; for the *ad valorem* fee would require to be calculated on Rs. 10,000, less Rs. 4,000 which the plaintiff has been ordered to pay, *i. e.*, on Rs. 6,000. I think, however, that they are entitled to appeal against the decree as it stands and to value their appeal for the purposes of the Court Fees Act, under section 7 (v) (*a*) of the said Act. I hold that the memorandum of appeal is sufficiently stamped.

Report partly accepted.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

BABU LAL (OBJECTOR) v. GHANSHAM DAS AND ANOTHER (OPPOSITE-PARTIES).* 1924 May, 8.

Muhammadan law—Gift—Condition against alienation—Such a condition between Muhammadans invalid.

The incidents of a gift as between two Muhammadans are governed by the Muhammadan law and not by the Transfer of Property Act, 1882. A provision purporting to take away the donee's power of transfer being under the Mohammadan law invalid the donee will, in despite thereof, take an absolute estate.

Abdul Karim Khan v. *Abdul Qayam Khan*, (1) and *Nizam-ud-din Ghulam* v. *Abdul Ghafur*, (2) referred to.

THE facts of the case are clearly stated in the following judgment of the District Judge :—

This is an objection to an attachment by the Receiver of a 1/16th share in a house situate in Hathras, which share is alleged to belong to the insolvent, Mehdi Hasan.

The house in suit originally belonged to one Barkat-ullah, who by partition on the 5th November, 1902, made over 4th to Unda Begum and 4th to Ahsan-ullah. On the same date Ahsan-ullah out of his share gifted three annas to Mehdi Hasan and two annas to Wazir Muhammad. In respect of the former, the gift was with the right of transfer, and in respect of the two annas gifted to Wazir Muhammad the deed provides that the donee shall have no right of transfer. The object of this provision was clearly to secure the property to Wazir Muhammad during his life-time and, afterwards, to his legal heirs. Wazir Muhammad has since died and Mehdi Hasan would ordinarily succeed to a one anna share out of the two annas owned by him in this house, but before his death, on the 30th of January, 1920, Wazir Muhammad gifted back his two annas share to the original donor, Ahsan-ullah, and Ahsan-ullah sold the whole house for consideration to the objector, L. Babu Lal, on the 29th of April, 1920.

All the above facts are admitted by the parties. The only question is whether the limitation as regards the right of transfer in the deed of gift in favour of Wazir Muhammad is nullified by section 10 of the Transfer of Property Act. The wording of the deed of gift is ambiguous, since, after saying that both Mehdi Hasan and Wazir Muhammad will become owners or *malik* of the shares transferred to each of them, the deed goes on to deprive Wazir Muhammad of the right of transfer while allowing that right to Mehdi Hasan. I consider that the intention of the parties was that the property should be enjoyed by Wazir Muhammad only for his life-time and should afterwards pass to his heirs. At the time the donors, Ahsan-ullah and Mehdi Hasan, were the heirs of Wazir Muhammad. It is clear that the re-transfer in favour of Ahsan-ullah was made with the object of preventing any share passing to Mehdi Hasan after the death of Wazir Muhammad, presumably because in the meantime Mehdi Hasan had become insolvent. The objector, who is the representative of Ahsan-ullah as the result of a transfer by sale, is not in a position to dispute the terms of the gift made by Ahsan-ullah himself in favour of Wazir Muhammad.

I, therefore, dismiss the objection with costs.

Dr. *S. M. Sulaiman*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

* First Appeal No. 19 of 1922, from an order of O. F. Jenkins, District Judge of Budaun, dated the 5th of November, 1921.

(1) (1906) I. L. R., 28 All., 342.
(2) (1888) I. L. R., 13 Bom., 264.

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BABU LAL v. GHAN HAM DAS

PIGGOTT and WALSH, JJ.—The facts out of which this appeal arises are so clearly stated in the judgment under appeal that it is unnecessary for us to recapitulate them. The question in issue is whether an insolvent of the name of Mehdi Hasan did or did not inherit a fractional share in a certain house on the death of one Wazir Muhammad. Wazir Muhammad's interest in that house was derived from a deed of gift and before his death he had executed another deed by which he returned his share in the house to his own donor, Ahsan-ullah Khan. If Wazir Muhammad had a right to gift this property back to Ahsan-ullah Khan, then it did not belong to him at his death and under no circumstances could Mehdi Hasan inherit anything. It is contended that Wazir Muhammad himself held only a life-estate. The court below has discussed the matter only with reference to the terms of the Transfer of Property Act, but the parties are Muhammadans, and we do not see our way to take this case out of the operation of the principle recognized by this Court in *Abdul Karim Khan* v. *Abdul Qayum Khan*, (1) and by the Bombay High Court in *Nizam-ud-din Ghulam* v. *Abdul Ghafur* (2). It would seem that this point was not brought to the notice of the learned District Judge when he was dealing with this matter. We must allow the appeal. We set aside the order of the court below and affirm the objection of the appellant. The appellant is entitled to his costs in both courts, which the receiver may charge against the insolvent's estate.

Appeal allowed.

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal

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May, 8.

SRI THAKURJI AND ANOTHER (PLAINTIFFS) v. HIRA LAL (DEFENDANT) *

Act (Local) No IV of 1912 (Court of Wards Act), section 55—Disqualified proprietor—Suit by disqualified proprietor as manager of an idol.

Section 55 of the Court of Wards Act, 1912, has no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee. A person who happens to be the manager of an endowed property cannot be regarded as a disqualified proprietor in respect of the property which he so holds as manager, and the idol, in whom the endowed property is supposed to be vested, cannot be treated as a Ward within the meaning of section 55 of the Act.

* Second Appeal No. 1132 of 1920, from a decree of L. S. White, District Judge of Cawnpore, dated the 7th of June, 1920, reversing a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 10th of February, 1919.

(1) (1906) I. L. R., 28 All., 342
(2) (1888) I. L. R., 13 Bom., 264

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SRI THAKURJI v. HIRA LAL.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellants.

Babu *Harendra Krishna Mukerji*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ.:—The dispute in this case relates to a plot of land situate in the village Sisamau in the Cawnpore district. The plaintiffs claimed to be co-sharers of a mahal to which this land appertains. One of the plaintiffs is an idol whose property is under the management of Ajodhya Prasad. The other two plaintiffs are Ajodhya Prasad and Baldeo Prasad, whose property is under the management of the Court of Wards. There is another co-sharer, Sheo Prasad, whose property is also under the management of the Court of Wards. The allegation of the plaintiffs was that the defendant Hira Lal had taken wrongful possession of the disputed land and started making constructions thereon without any right. The defence of Hira Lal was that the plaintiffs had not been in possession of the disputed land and that he had been in possession thereof for more than twelve years. The court of first instance found against him and decreed the claim. On appeal one of the pleas taken up for the first time on behalf of Hira Lal was that the plaintiffs had no right to maintain the suit because their property was under the management of the Collector of Cawnpore as Manager of the Court of Wards. An issue was thereupon remitted by the lower appellate court to the court of first instance to ascertain whether the property of the plaintiffs was under the superintendence of the Court of Wards. The finding on that issue was that Ajodhya Prasad and Baldeo Prasad had been declared to be disqualified proprietors and that their property had been taken possession of by the Court of Wards under its superintendence along with that of Sheo Prasad. It was found, however, that the property of the idol, who is the first plaintiff, was not under the superintendence of the Court of Wards. On that finding the learned District Judge proceeded to dismiss the suit, holding that Ajodhya Prasad, who was the Sarbarahkar of the property of the idol, was not entitled to maintain the suit on behalf of the idol, any more than the other plaintiffs, under section 55 of the Court of Wards Act (IV of 1912). That section has, however, no application to cases where a disqualified proprietor has no personal interest in the property by virtue of which a right to

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sue is claimed. His disability extends to the property he owns and not to that which he holds as a trustee. A person who happens to be the manager of an endowed property is not the owner of that property and holds no beneficial interest therein. He cannot be regarded as a disqualified proprietor in regard to the property which he so holds as manager, and the idol, in whom the endowed property is supposed to be vested, cannot be treated as a ward within the meaning of section 55 of the Act. The property of the idol was never in fact taken over by the Court of Wards under its management. The plea was clearly untenable. Indeed, as pointed out in *Mannu* v. *Nasrat-ullah Khan* (1), one of the co-sharers can sue to eject a trespasser from the joint land, and the suit was maintainable.

We accordingly allow the appeal, set aside the order of the lower appellate court and remand the case under order XLI, rule 23, to that court with a direction to reinstate it on its file of pending cases and dispose of it according to law. The costs here and hitherto will abide the result.

Appeal decreed.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr Justice Stuart

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February, 27.

SHIB DAYAL AND ANOTHER (PLAINTIFFS) v JAGANNATH PRASAD (DEFENDANT)*

Act No IX of 1908 (Indian Limitation Act), section 5—Appeal filed after time owing to erroneous advice given by vakil—Extension of period of limitation

Held that an honest mistake on the part of a litigant caused by erroneous advice given to him by his vakil in the district, by reason of which an appeal was not filed until the period of limitation therefor had expired, is a good ground for the application in favour of the would-be appellant of the provisions of section 5 of the Indian Limitation Act, 1908

Wazir Ali Khan v *Zamab* (2), *Kura Mal* v *Ram Nath* (3) and *Anjora Kunwar* v *Babu* (4) followed *Coles* v *Ravenshear* (5) and *In re Helsby* (6) referred to

THE period for filing a certain second appeal expired on the 3rd of May, 1921. On the 2nd of May, the appeal was laid before the Court, but it was accompanied only by copies

* Application in Second Appeal No 742 of 1921.

(1) Weekly Notes, 1901, p 36
(2) Weekly Notes, 1903, p 32
(3) (1906) I L R, 28 All., 414.
(4) (1907) I L R, 29 All, 638
(5) (1907) 1 K. B, 1
(6) (1894) 1 Q B., 742

of the judgment and decree of the lower appellate court and not by a copy of the judgment of the court of first instance, without which the appeal could not be legally "presented". The absence of a copy of the judgment of the first court was explained—and this explanation was accepted by the High Court—by the fact that the would-be appellants had been informed by their vakil in the district that it would not be required. The appellants then procured a copy of the judgment of the court of first instance and presented their memorandum of appeal to the High Court together with an application praying that in the circumstances the appeal might be admitted notwithstanding that it was beyond time. The sole question before the Court was whether the fact that a party had been misled by the advice given to him by his vakil in the district was sufficient ground for the application in his favour of section 5 of the Indian Limitation Act, 1908.

Babu *Sital Prasad Ghosh*, for the appellants.

Munshi *Harnandan Prasad* (for Babu *Priya Nath Banerji*), for the respondent.

MEARS, C. J.:—In this case the appellant applied under section 5 of the Limitation Act and asked that a time-barred appeal might be heard on the ground that there was 'sufficient cause' for his having failed to comply with the rules. When a second appeal is presented to this Court, there is no doubt that the copy of the first court's judgment and a copy of the judgment and decree of the lower appellate court must be filed. The appellant waited until almost the last day for the admission of his appeal, and then, on the 2nd of May, 1921 filed the judgment and decree only of the lower appellate court. The last day of limitation expired on the 3rd of May, 1921. The appellant, having learnt that the appeal could not be admitted without the judgment of the first court, subsequently obtained it and then asked that time should be extended and the appeal admitted. It is stated that his failure to comply with the rules was due to the error of the vakil, in the district, who had informed him that the judgment and decree of the lower appellate court were alone necessary.

We believe that this is what actually happened, and, therefore, the question arises whether that explanation can in the year 1922 be accepted as sufficient cause. There is no doubt it was the practice in past years to allow applications of

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this kind, and between 1903 and 1907 distinguished Judges of this Court did absolve the applicant from the consequences of an error on the part of his legal practitioner. See *Wazir Ali Khan* v. *Zamab* (1), *Kura Mal* v. *Ram Nath* (2) and *Anjora Kunwar* v. *Babu* (3)

In 1914 the case of *Dewan* v. *Buddhu* (4) came before Sir SUNDER LAL on appeal from the District Judge who had admitted a time-barred appeal. The circumstances under which the omission to file the appeal within time took place were not very clearly put forward by the applicant but it "was not suggested that there was any misapprehension on the part of Mr. *Weston* (the counsel employed to file the appeal) as to the time within which the appeal ought to have been lodged." Sir SUNDER LAL thinking that the explanation of the delay was "utterly inadequate," overruled the decision of the District Judge. That case is, therefore, clearly distinguishable from the present one, and notably from the decision of STANLEY, C. J., and BANERJI, J., in *Kura Mal* v. *Ram Nath* (5) On appeal a Bench of this Court upheld the decision of Sir SUNDER LAL on the ground that the lower appellate court had no materials upon which a discretion could be exercised: *Buddhu* v. *Diwan* (6)

During the hearing of this application it was suggested, by Mr. JUSTICE STUART, that the more correct principle was that laid down in the English decisions by which a default by the legal practitioner is not held to be a sufficient cause for extending the time for an appeal. Except for expressions of regret on the part of COLLINS, M. R., and COZENS HARDY, L. J., in the case of *Coles* v. *Ravensiear* (7), the current of English decisions is consistent and the result may be summarized in the words of DAVEY, L. J., who in *In re Helsby* (8) concluded his judgment by saying "I cannot see that a mistake made by a solicitor of the party who is applying for an extension of time is sufficient ground for extending it."

The English Courts have laid stress upon the fact that the proposed respondent to an appeal has a right to hold his

(1) Weekly Notes, 1903, p. 32.
(2) (1906) I. L. R., 28 All., 414.
(3) (1907) I. L. R., 29. All., 638.
(4) (1914) 12 A. L. J., 887.
(5) (1906) I. L. R., 28 All., 414.
(6) (1915) 13 A. L. J., 268.
(7) (1907) 1 K. B., 1.
(8) (1894) 1 Q. B., 742.

judgment and that such right ought not to be interfered with after the lapse of the prescribed time, unless there are special circumstances.

The question which is to be decided is one of policy. If this Court decides to break away from its decisions, pronounced during the period 1903 to 1907, it will not mean that these cases were wrongly decided at the time that they were so decided. In the past 15 years, legal education has progressed in this country and courts are right in demanding, in the public interest, increasing competence in legal practitioners. Whilst I am of opinion that the English rule is a salutary one, and the courts should ordinarily insist upon legal practitioners giving correct advice, it may nevertheless be that to demand at the present time a normal standard of efficiency would impose hardship upon litigants.

In this aspect of the case the decision must turn upon the question whether the profession in the muffassil is in such a state of efficiency as to make it expedient to depart from the rule which has hitherto prevailed in this Court. Mr. *Sital Prasad Ghosh* laid emphasis on the disadvantages of practitioners in places remote from libraries, and I give weight also to the argument used by him that there is in the muffassil some want of knowledge of the procedure of the High Court. My opinion as to the general average of efficiency must necessarily be based upon the quality of work as disclosed in the printed records which come up here on appeal. The work, no doubt, has been done with increasing care and discrimination, and, therefore, the records of 1917, 1918 and 1919 now coming before us in appeal do not, I believe, present a fair picture of the standard of the records in current cases in the lower courts. Every one who practises in this Court will agree that throughout the last two years there has never been one week in which counsel, on one side or the other, has not admitted himself to be in difficulty, by reason of the way in which the case was launched or conducted in the court below, and the complaint is always based, not upon some mere technicality but upon a matter of real importance and substance, such as some grave defect of pleading, failure to obtain essential particulars under Order VI, rules 4 and 5, the omission to call the plaintiff or defendant or some necessary witness or the deliberate withholding of documents or books of account. I am, therefore, of opinion that, at the present,

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we ought to maintain our existing practice, namely, that mistakes of the kind, into which we are inquiring, should not bar appeals. An honest mistake, even though a negligent one, ought not, in the present state of the profession in the district, be allowed to operate to the prejudice of clients. I would, therefore, admit the application.

BANERJI, J.—I, also, am of opinion that the application should be granted and the appeal admitted. The petition of appeal was presented one day before the expiry of the prescribed period of limitation, but on that date a copy of the judgment of the court of first instance was not filed with the memorandum of appeal, as required by the rules of this Court. When the copy was, subsequently, produced, the period of limitation had expired. For this reason the appellant has now applied under section 5 of the Limitation Act for the admission of his appeal after the expiry of the period of limitation. Under section 5 of the Limitation Act, a petition of appeal may be admitted after the expiry of limitation, if sufficient cause is established to the satisfaction of the Court. What constitutes sufficient cause cannot be laid down by hard and fast rules. The sufficient cause must be determined on a reference to the circumstances of each case. In my opinion the expression "sufficient cause" should be liberally construed so as to advance substantial justice. In the present case the sufficient cause alleged is that the appellant was advised, by his vakil in the lower court, that copies of the judgment and the decree of the lower appellate court would be sufficient for the purposes of his appeal. He honestly believed that the advice given to him was correct, and in this honest belief he made a delay in the presentation of the copy of the judgment of the court of first instance, and, therefore, asks that his appeal should be admitted although the period of limitation has expired.

It has been held in this Court in the cases to which the learned Chief Justice has referred, that an honest mistake made by a litigant upon incorrect advice given to him by his lawyer is a sufficient cause within the meaning of section 5 of the Limitation Act. These are the cases of *Wazir Ali Khan* v. *Zainab* (1), *Kura Mal* v. *Ram Nath* (2), *Anjora Kunwar* v. *Babu* (3). A similar view was also held by the High Courts

(1) Weekly Notes, 1903, p. 32
(2) (1906) I. L. R., 28 All., 414
(3) (1907) I. L. R., 29 All., 638.

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of Calcutta and Madras in the cases to which Mr. *Sital Prasad Ghosh* invited our attention in the course of his argument. The same principle was affirmed by a Full Bench of this Court in the case of *Brij Mohan Das* v. *Mannu Bibi* (1). In all these cases it was held that if there has been an honest mistake on the part of the litigant, and this mistake has been caused by reason of incorrect advice given to him by his counsel, he is entitled to have his appeal admitted under section 5 of the Limitation Act. The case of *Buddhu* v. *Diwan* (2) was referred to as laying down a different proposition I do not think that this is so. The question which arises in this case was not the question which was considered and decided in that case. There the counsel for the appellant had omitted to present his petition of appeal in due time, although he had been furnished with the necessary papers and the necessary costs. That was a case in which there was culpable negligence on the part of the counsel, and for this reason it was held that no sufficient cause had been established for the admission of the appeal after time. I was a party to one of the cases cited above, and I see no reason to alter the opinion which was expressed in that case

A contrary view was held in the case of *Coles* v. *Ravenshear* (3) But two of the learned Judges felt themselves bound by a recent authority in that Court. COLLINS, M. R., said :—" I confess that if the case were free from authority and I felt myself at liberty to follow my own judgment in the matter, I should unhesitatingly allow the time to be extended ". COZENS HARDY, L. J., observed : " If the matter had been free from authority, I should have preferred, in a case where there has been an honest mistake by the legal adviser of a party, . . . to hold that the Court would be justified in giving the leave ". He also added that the course of authority on the subject in England had been " far from uniform ".

In this Court, as I have pointed out above, there is a consensus of authorities and, I think, upon those authorities, from which I see no reason to depart, we should be justified in admitting the appeal, which must be taken to have been filed after the period of limitation.

(1) (1897) I L R , 19 All , 348.
(2) (1915) 13 A L. J , 286
(3) (1907) 1 K. B , 1.

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The remarks which the learned Chief Justice has made as to the duty of practitioners in the districts, have my full concurrence, and I hope that those practitioners will bear them in mind.

STUART, J.—While I am still of opinion that the rule as laid down by JAMES, L. J., in the *International Financial Society* v. *City of Moscow Gas Company* (1) and again in *In re Helsby* (2) is the rule which I should like to see enforced in this Court, I am convinced upon the reasoning of the Chief Justice that the time has not yet come when it would be wise to enforce this rule. I, therefore, concur in the order passed.

BY THE COURT :—Our order, therefore, is that we extend the time for the filing of these two appeals and declare the appeals admitted. Let a date be fixed under Order XLI, rule 11, of the Code of Civil Procedure for hearing.

Appeal admitted.

REVISIONAL CRIMINAL.

1922
April, 5.

Before Mr. Justice Stuart.

EMPEROR v. SUNDAR LAL.*

Criminal Procedure Code, section 476—Jurisdiction—Powers of court which has partly heard a case subsequently transferred to another court.

The circumstance that a case has passed out of the hands of a court, as, for instance, by an order of transfer, after it has been partly heard, does not deprive the first court of its jurisdiction to take proceedings against a witness under section 476 of the Code of Criminal Procedure, nor is that jurisdiction taken away by the circumstance that the second court may have formed a different opinion as to the veracity of the witness. *King-Emperor* v. *Zalim Singh* (3) and *Girwar Prasad* v. *King-Emperor* (4) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the petitioner.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

STUART, J. :—The facts out of which this application for revision has arisen, are as follows :—Mr. Parmanand Singh, Tahsildar of Basti, as Magistrate of the third class, tried in 1921 a criminal case in which Adhar Singh made a complaint against Devi Bakhsh Singh under the provisions of section 352/447 of the Indian Penal Code. In the course

* Criminal Revision No. 113 of 1922, from an order of J. F. Sale, District Magistrate of Basti, dated the 2nd of March, 1922.

(1) (1877) L. R., 7 Ch. D., 241.
(2) (1894) 1 Q. B., 742.
(3) Weekly notes, 1901, p. 177.
(4) (1909) 6 A. L. J., 392.

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of the trial, Sundar Lal, patwari, gave evidence. As a result of the examination of this evidence, Mr. Parmanand Singh came to the conclusion that Sundar Lal was not telling the truth in his evidence, and that he had falsified certain of his records. Mr. Parmanand Singh did not complete the decision of the case, for, after he had heard practically all the evidence, the case was transferred for decision to the court of Mr. Sarju Prasad, Honorary Magistrate, by an order of the District Magistrate of Basti. There is nothing before me to show why the order of transfer was passed. Such order was, however, passed and the case left Mr. Parmanand on the 3rd of September, 1921. Mr. Sarju Prasad decided it on the 7th of October, 1921. He acquitted the accused persons and found that the patwari, Sundar Lal, was telling the truth, and that the entries in his records were correct. Mr. Parmanand then proceeded to make a preliminary inquiry into the truth of the patwari's statements in the case in question, and into the nature of the entries in the patwari's records to which I have already referred. He appears to have lost no time in sending for the patwari and to have made a careful inquiry, in which the patwari was given every opportunity of meeting the charges. He finally passed an order under section 476 of the Code of Criminal Procedure and sent Sundar Lal, patwari, to the District Magistrate to be tried on certain charges. This order is dated the 25th of January, 1922. Sundar Lal applies in revision to have the order set aside.

The points taken by the learned counsel who represents Sundar Lal, are :—That Mr. Parmanand Singh having ceased to be seised of the case on the 3rd of September, 1921 had no jurisdiction to pass the order which he passed, and that, on the merits, the offences suggested have clearly not been committed upon the finding of Mr. Sarju Prasad.

The plea raises a question which, as far as I know, has not been decided by any court so far. If a court is of opinion that there is ground for inquiry into any offence referred to in section 195 of the Code of Criminal Procedure committed before it in the course of a judicial proceeding, even if the case has passed out of the hands of that court and been decided by another court, it cannot be held that the first court's powers under section 476 of the Code of Criminal Procedure came to an end.

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The circumstance that a case has passed out of the hands of a court, in so far as an effective order regarding its disposal is concerned, does not deprive the court of its jurisdiction under section 476 of the Code of Criminal Procedure, according to the view taken in this Court. In *King-Emperor* v *Zahm Singh* (1), KNOX, A. C. J., decided that a Subordinate Judge was competent to take proceedings under section 476 of the Code of Criminal Procedure after another court had finally decided the case. In a decision of a Bench in *Gurwar Prasad* v. *King-Emperor* (2), an order under section 476 of the Code of Criminal Procedure, passed considerably after the matter had left the hands of the court passing the order, in so far as its final determination of the matter before it was concerned, was upheld. The views enunciated by the Madras High Court in *Rahimadulla Sahib* v. *Emperor* (3) and *Ayahannu Pillai* v. *Emperor* (4), were not accepted in their entirety by that Bench. The view which I take is that under the provisions of section 476 of the Code of Criminal Procedure, proceedings can undoubtedly be taken by a court after the decision in the substantive case has been delivered and the court is *functus officio* in respect of the decision of the substantive case. There can, I think, be no doubt on this point on the plain reading of the section. The further point remains: does the circumstance that another court has arrived at a different conclusion on the merits, take away this jurisdiction? I do not see how any finding by another court can take away this jurisdiction; so my opinion is that Mr. Parmanand had jurisdiction to pass this order.

I would not, however, leave the matter there. This Court has decided that it is the duty of the High Court, when matters such as these are brought to its notice, to satisfy itself that there has been no unreasonable delay, that the orders are not vexatious and that the charges are not of a flimsy nature, and I consider it necessary to examine the order of Mr. Parmanand Singh from these points of view. There has certainly been no unnecessary delay in this matter. Mr. Parmanand Singh was well advised in awaiting the decision of the case before he proceeded with the section 476 (Criminal Procedure Code) proceedings, and it appears that, once the

(1) Weekly Notes, 1901, p. 177.
(2) (1909) 6 A. L. J., 392 (396).
(3) (1907) I L. R., 31 Mad., 140.
(4) (1908) I L. R., 32 Mad., 49.

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case had been decided, he put the inquiry through as expeditiously as he could. I am perfectly ready to examine the matter upon its merits. For obvious reasons—largely in the interests of the applicant himself—I do not propose to arrive at a definite conclusion. If I were satisfied with Mr. Sarju Prasad's reasons for believing the patwari to be telling the truth and for believing the entries made in the patwari's records to be correct and genuine entries, or considered his reasons of such weight as practically to conclude the matter, I should have had no hesitation in setting aside this order, and if I were satisfied that Mr. Parmanand Singh had passed the order under section 176 of the Code of Criminal Procedure for insufficient reasons, I should have been ready, apart from anything which Mr Sarju Prasad had said, to set aside that order. But upon the merits I do not find Mr. Sarju Prasad's reasons convincing, and I find Mr. Parmanand Singh's proceedings to have been most careful and his order to have been well thought out. It would be unfair to the applicant to carry the matter further. For the above reasons, I dismiss this application.

Application dismissed.

REVISIONAL CIVIL.

Before Mr Justice Gokul Prasad.

RAM SAHAI, CHHIDDA LAL (PLAINTIFFS) v. THE EAST INDIAN RAILWAY COMPANY (DEFENDANT)* 1922 *April*, 19

Act No IX of 1890 (Indian Railways Act), section 77—Suit against a railway—Notice of suit—Notice to be served on the Agent of the defendant railway

The notice required by section 77 of the Indian Railways Act, 1890, as a condition precedent to the institution of a suit for damages against a Railway Company must be served on the Agent, and cannot be replaced by a notice served on the Divisional or General Traffic Manager. *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1) and *Great Indian Peninsula Railway Company* v. *Ganpat Rai* (2) referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Munshi *Panna Lal*, for the petitioner.

Pandit *Ladli Prasad Zutshi*, for the opposite party.

GOKUL PRASAD, J.:—The plaintiff applicant despatched

* Civil Revision No 151 of 1921.

(1) (1906) I L. R., 28 All., 552.

(2) (1911) I L R., 33 All., 544

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two consignments of brassware from Delhi to Aligarh, on the 20th of April, 1920. These consignments did not arrive at their destination, and the plaintiff, after correspondence with the Divisional Traffic Manager, Cawnpore, served a notice on the Agent of the East Indian Railway Company on the 6th of December, 1920 admittedly more than six months after the delivery of goods. The plaintiff thereupon instituted the present suit for recovery of damages for loss of goods. He was met with an objection by the defendant East Indian Railway to the effect that the suit did not lie, as the notice contemplated by section 77 of the Railways Act, No. IX of 1890, had not been given.

The learned Judge of the Court of Small Causes has come to the conclusion that the notice which had to be given in the present case under section 77 of the Railways Act was a notice to the Agent of the Company and that any correspondence with or notice to the Divisional Traffic Manager at Cawnpore would be of no avail. It is true that the notice contemplated by section 77 of the Indian Railways Act and, having regard to section 140 of the same Act, in the case of State Railways managed by a company, is served on the Government or on the Agent of the company managing the railway or the Manager of the Government. In the present case, whatever interpretation might be put on the correspondence between the Divisional Traffic Manager and the plaintiff, it cannot amount in law to a notice on the Agent of the defendant company. This point is covered by the case of *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1), where the plaintiff had given notice to the General Manager, and in that case it was held that it was not equal to a notice on the Agent as contemplated by the aforesaid sections, so that on this point the trial court was correct.

The other point argued before me was that having regard to the terms printed on the back of the receipt given by the Railway, no notice was necessary. A reference was made to paragraph No. 5, commencing with the words "all claims etc.", and it was argued that having regard to this special condition, the notice contemplated by section 77 of the Indian Railways Act was not necessary. This point, too, has been the subject of a decision of this Court: see the

(1) (1906) I. L. R., 28 All., 552.

Great Indian Peninsula Ry. Co. v. *Ganpat Rai* (1). and a Bench of this Court has held that a condition like that does not absolve the person who claims to make the Railway Company liable from the necessity of giving the notice contemplated by section 77 of the Indian Railways Act. This ground of attack also fails I, therefore, dismiss this application for revision and confirm the decree of the trial court with costs.

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Application dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Stuart.

1922 *April*, 21.

EMPEROR *v.* INCHA RAM *

Act No XLV of 1860 (Indian Penal Code), section 182—False information given to the police with the object of having a charge brought against a certain person

Where a person falsely gave information to the police that a horse belonging to him had strayed, when in fact he had sold it some time previously, and did this with the intention that a charge should be brought against the purchaser

Held that the giver of such information was rightly convicted under section 182 of the Indian Penal Code.

THIS was a reference made by the Sessions Judge of Moradabad under section 435 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the judgment of the Court.

Referring Order :—" The applicant in this case, Incha Ram, has been convicted in a summary trial under section 182 of the Indian Penal Code and has been sentenced to one month's rigorous imprisonment. The facts as found by the Magistrate are as follows :—On the 31st of December, 1921 the applicant reported at the thana that his horse had strayed from the jungle on the previous day. An inquiry was made by the police and the chaukidar of the village reported that some months before Incha Ram had sold the animal to one Chadammi Lal, who is said to be his cousin, and that Chadammi Lal on the 26th of December, 1921 had sold it at Rith cattle market to a third person. After the institution of proceedings under section 182 of the Indian Penal Code Incha Ram brought a case against Chadammi Lal under sections 379/411 of the Indian Penal Code. In that case the

* Criminal Reference No. 184 of 1922.

(1) (1911) I L. R., 33 All , 544.

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Magistrate took evidence under section 202, Criminal Procedure Code, and finally dismissed the complaint under section 203, Criminal Procedure Code

It has been urged in revision that the act for which the applicant has been convicted went no further than the preparation for the commission of an offence, and that the report, not being of a cognizable offence and not in itself calling for any action by the Police, fell short of the conditions justifying a conviction under section 182 of the Indian Penal Code I have been referred to the ruling of the High Court in the case of *Algoo Lal* v. *Emperor* (1). The principle there laid down seems to me to apply to the present case. The fact that here the alleged false report was followed by a complaint of theft does not affect the principle. I hold that the conviction was bad on a point of law I therefore forward the record to the Hon'ble High Court with the recommendation that the conviction of Incha Ram under section 182 should be set aside."

The parties were not represented in the High Court

STUART, J.:—Incha Ram made a report at the police station that his horse had strayed. This report was false to his knowledge. His horse had not strayed. He had previously sold the horse to his cousin and he clearly made this false report in order to enable him to make a false charge against the man who had bought the horse from his cousin. He made that charge subsequently. In making this report he clearly gave false information to the Police which he knew to be false and he must have known that it was likely that he would thereby cause the police authorities, if they found the horse answering to his description, to take it from the possession of its rightful owner On these facts an offence under section 182 was clearly made out. I accordingly refuse to interfere and return the record.

(1) (1920) 18 A L J., 636

APPELLATE CIVIL.

Before Mr Justice Piggott and Mr Justice Walsh

MOHAN LAL (DECREE-HOLDER) v. BALA PRASAD AND ANOTHER (JUDGMENT-DEBTORS) AND CHHADAMMI LAL (DECREE-HOLDER) * 1922 *April*, 25.

Hindu law—Joint Hindu family—Execution of decree—Personal decree against father—Execution taken against the joint family property—Rights of sons

In the case of a joint Hindu family governed by the Mitakshara law a decree against the father alone can be executed against the whole of the joint family property unless the sons can show that the debt in respect of which the decree has been obtained was a debt incurred for illegal or immoral purposes *Karan Singh* v. *Bhup Singh* (1), *Babu Singh* v. *Bihari Lal* (2) and *Indar Pal* v. *The Imperial Bank* (3) followed *Saha Ram Chandra* v. *Bhup Singh* (4) and *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (5) followed *Sheo Dhan Singh* v. *Bhagwan Singh* (6) dissented from

THE facts of this case sufficiently appear from the judgment of PIGGOTT, J.

Munshi *Narain Prasad Ashthana*, for the appellant.

The respondents were not represented.

PIGGOTT and WALSH, JJ. —This is an appeal by the decree-holder in a mortgage suit. That suit was against a variety of defendants, but the only point with which we are concerned here is that, while a decree for sale was passed affecting various mortgaged properties, there was also a simple money decree enforceable against one Ganga Prasad alone In execution of this decree there has been an attachment of certain immovable property specified as being the property of Ganga Prasad, judgment-debtor. It is not property which was included in the mortgage upon which the suit was brought, so that no objection can be taken on that ground to its attachment in execution of a simple money decree. In fact, in so far as the property attached is the property of Ganga Prasad, its attachment is not objected to. The objection taken was on behalf of Bala Prasad and Nannhe, minor sons of Ganga Prasad. Their claim was that, the property attached being joint ancestral family property, they were joint owners of the same with their father and that the remedy of the decree-holders was limited to execution against the share which their father would take on partition, that is to say, one-third

* First Appeal No 158 of 1920, from a decree of Govind Sarup Mathur, Subordinate Judge of Agra, dated the 1st of May, 1920

(1) (1904) I L R, 27 All, 16 (2) (1905) I L R, 30 All, 156
(3) (1915) I L R, 37 All, 214 (4) (1917) I L R, 39 All, 437
(5) (1916) I L R, 44 Calc, 524 (6) (1921) I L R, 43 All, 496.

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share of the whole. The execution court has allowed this contention and the appeal before us is against its decision. The point of law raised was supposed to have been settled so far as this Court is concerned by the decision of a Full Bench in the case of *Karan Singh* v. *Bhup Singh* (1). That case has been followed and applied since that date in a number of other cases. We are content to refer to two cases, to one of which one of us was a party, which are:—*Babu Singh* v. *Bihari Lal* (2) and *Indar Pal* v. *The Imperial Bank* (3). All these cases are against the view taken by the court below and, if they were correctly decided, then it is competent for the holders of a simple money decree against Ganga Prasad to attach the joint family property of Ganga Prasad and his minor sons in the hands of their judgment-debtor and to bring to sale the right, title and interest of the father and of the sons in satisfaction of their decree. There has been a recent decision to the contrary, namely, the case of *Shee Dhan Singh* v. *Bhagwan Singh* (4). The respondents were not represented at the hearing of that appeal and no reference is made to any previous decision of this Court. The learned Judges proceeded upon a decision of the Judicial Commissioner's Court of Oudh and based themselves upon an interpretation which they put upon certain passages in the judgment of their Lordships of the Privy Council in the well-known case of *Sahu Ram Chandra* v. *Bhup Singh* (5). We have given our best consideration to the arguments on this point, but we think that as the matter stands at present we ought to follow the decision of our Full Bench. The question for determination before their Lordships of the Privy Council in *Sahu Ram Chandra's* case had nothing to do with the rights of the holders of a simple money decree. If it be said that there are passages in the judgment then delivered which suggest that the older decisions of the Courts in India, of which the Full Bench case of *Karan Singh* v. *Bhup Singh* (6) is a specimen, proceeded upon a mistaken view as to the effect of the pious duty of Hindu sons to discharge their fathers' debts when not tainted with immorality, it can be said, on the other side, that only a few months before the decision in *Sahu Ram Chandra's* case their Lordships of

(1) (1904) I. L. R., 27 All., 16.
(2) (1908) I. L. R., 30 All., 156.
(3) (1915) I. L. R., 37 All., 214.
(4) (1921) I. L. R., 43 All., 496.
(5) (1917) I. L. R., 39 All., 437.
(6) (1904) I. L. R., 27 All., 16

the Privy Council, in the case of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1), had re-affirmed in the clearest possible language the principles deducible from a number of previous decisions upon which the Full Bench of this Court had proceeded. The words used at the bottom of page 532 of the report are as follows:—

"The property in question was joint property governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone."

Unless, therefore, further light is thrown upon this question by some further pronouncement on the part of their Lordships of the Privy Council, we think we ought to abide by the statement of the law as it was understood to have been settled by the Full Bench of this Court in the year 1904. The same view has been taken by two other High Courts in India, *vide* I. L. R., 43 Bom., 612, and I. L. R., 48 Calc., 341. It has been suggested in argument that a distinction should be made against the decree-holder in this present case because he had impleaded the sons in his suit upon the mortgage and as against the sons his suit had been dismissed. It does not seem to us that this affects the question for determination. The sons were impleaded in the mortgage suit with a view to making their interest in the mortgaged property available in satisfaction of the plaintiffs' claim. That attempt failed and it is not now sought in the execution department to attach the interests of the sons in the mortgaged property. There could have been no question in the suit as brought of a simple money decree against the sons. What is to be determined is, what property is or is not available to the decree-holder in execution of his simple money decree against the father alone. That question, according to the older decisions of this Court, which we desire to follow, must be answered in favour of the decree-holder. We, therefore, allow this appeal to this extent, that we send back the case to the court below with orders to proceed with the execution of the decree

(1) (1916) I. L. R., 44 Calc., 524.

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on the assumption that the shares of the minor sons of Ganga Prasad in the property sought to be attached are liable, unless the said sons can prove that the debt in respect of which the simple money decree was passed was one tainted with immorality. The decree-holder should get his costs of this appeal.

WALSH, J.:—I agree. In my opinion it is too late to contend that the joint family estate cannot be sold to satisfy a personal decree against the father of a joint family; except in the one case of the sons being able to show that the debt was tainted with immorality. This appears to me to be established by a long line of decisions by the Privy Council, namely:—

Musammat Nanomi Babuasin v. *Modun Mohun* (1); *Bhagbut Pershad* v. *Musammat Girja Koer* (2); *Meenakshi Naidu* v. *Immudi Kanak Ramaya Kounden* (3); *Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai* (4), reviewed and explained by a Full Bench in *Karan Singh* v. *Bhup Singh* (5) and finally by the Lord Chancellor, Lord BUCKMASTER, in *Sripat Singh Dugar* v *Prodyot Kumar Tagore* (6) The opinion of their Lordships in *Sahu Ram Chandra* (7) relates to a case in which an alienation by mortgage was sought to be enforced and all other possible remedies of the mortgagee had been extinguished. I agree with the view which seems already to have been expressed in India that it could hardly have been intended by what was said in the opinion of their Lordships in that case to reverse everything that had been said before.

Appeal allowed.

Before Mr Justice Muhammad Rafiq and Mr. Justice Lindsay

1922
April, 27.

RAM BILAS AND OTHERS (DEFENDANTS) *v.* NITYA NAND AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1908), *section* 92—*Suit relating to a trust created for a public purpose of a charitable or religious nature—Suit against a trustee de son tort.*

Held that a suit of the nature mentioned in section 92 of the Code of Civil Procedure, 1908, will lie against a person who, without title, chooses to take upon himself the character of a trustee, or, in other words, a trustee *de son tort*. *Budree Das Mukim* v. *Chooni Lal Johurry* (8) referred to.

* First Appeal No 78 of 1920, from a decree of L. Johnston, District Judge of Pilibhit, dated the 14th of February, 1920.

(1) (1885) L. R., 13 I A., 1.
(2) (1888) L R, 15 I. A., 99
(3) (1888) L. R., 16 I A., 1.
(4) (1889) L. R, 17 I. A., 11.
(5) (1904) I. L. R., 27 All., 16.
(6) (1916) I. L. R., 44 Calc., 524.
(7) (1917) I. L. R., 39 All., 437.
(8) (1906) I. L. R., 33 Calc., 789.

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THE facts of this case are fully set forth in the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the appellants.

Mr. *J. M. Banerji*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—This appeal arises out of a suit brought in the court of the District Judge of Pilibhit, by three plaintiffs, Nitya Nand, Lal Bahadur and Tika Ram.

The suit purported to be a suit under section 92 of the Code of Civil Procedure, *i.e.*, a suit relating to a trust created for a public purpose of a charitable or religious nature.

There were six defendants to the suit, the principal of whom were Ram Bilas, defendant No. 1, Bankey Behari Lal, defendant No. 2, and Bhagwan Das, defendant No. 6. Defendants Nos. 3, 4 and 5 were really *pro formâ* defendants.

The parties all belong to the same family and the allegations in the plaint were to the following effect. It was stated that about 26 years before the institution of the suit one Nath Mal, who was the paternal uncle of the plaintiffs, had constructed a Thakurdwara at a village called Belsanda and had installed an idol therein.

It was next alleged that under a deed of waqf executed in August, 1865 the plaintiffs' father and his cousin Tula Ram had dedicated the entire 20 biswa share of mauza Badhepura Marauri for the support of the temple. It was further alleged that a trustee had been appointed under this deed, that the trust had been acted upon, and that the person who had been originally appointed trustee had died some seven years before the present suit was brought. It was then said that after the death of the original *pujari* his place was filled by another person and that thereafter the first defendant, namely Ram Bilas, who was a son of Tula Ram, one of the creators of the trust, had taken possession of the property and had posed as a trustee. The material allegation on this latter part of the case is to be found in paragraph 5 of the plaint.

It was stated that after the death of Tula Ram the name of Ram Bilas, defendant No. 1, was wrongly recorded in the revenue papers against the endowed property; in other words it was alleged that whereas the property belonged to the idol, Ram Bilas had got his name recorded in the papers as if he was the proprietor. A further allegation in the same paragraph of the plaint is that Ram Bilas was appointed

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lambardar and by his own improper action had held himself out as trustee of the endowed property.

In the 6th paragraph of the plaint it was stated that Ram Bilas as lambardar was misappropriating the income of the entire trust property and was not devoting that income to the uses declared by the trust.

Paragraph 14 sets out the reliefs claimed by the plaintiffs and the first relief claimed was that the first defendant, Ram Bilas, might be removed from the trust. The second relief claimed was that other trustees might be appointed to manage the trust property. The other reliefs need not be mentioned at this stage.

In his written statement Ram Bilas denied that he was trustee of the property in suit. In paragraph 9 of his written statement he raised the plea that the suit was not maintainable under section 92 of the Code of Civil Procedure because he (Ram Bilas) was in proprietary possession of the ten biswa share and was not a trustee but a zamindar and a lambardar. He claimed that the plaintiffs had no right to bring a suit for the purpose of having him removed from his office of lambardar and he disclaimed any liability to render any account in respect of the collections of the property in question

It is plain, therefore, that on these pleadings an issue arose as to whether the suit was maintainable under section 92 of the Code of Civil Procedure and accordingly issue No. 2 was directed to the trial of that question. The only finding at which the learned District Judge has arrived is as follows: He says—

> "Coming to the second issue I find that the trust was a valid one and is enforceable in law. Ram Bilas is the lambardar. There is no proof that he was appointed *mutawalli*, but it is immaterial if he was"

We do not agree with this dictum of the learned District Judge: on the contrary, for the purpose of deciding the second issue in the case it was a matter of supreme importance whether Ram Bilas, defendant No. 1, was or was not a trustee of the property in question. There seems to be no doubt whatever that Ram Bilas had not been regularly appointed as a *mutawalli* of the property in dispute. The allegation which the plaintiffs made against Ram Bilas was

that he had entered into possession of this property and held himself out to be the trustee. On the other hand, Ram Bilas denied altogether that he was in any way acting as a trustee or had in any way assumed the responsibility of a trustee. It was, therefore, a matter to be decided upon the evidence produced before the lower court whether the allegation contained in paragraph 5 of the plaint was made out, namely, that Ram Bilas after entering on the property had held himself out and acted as a trustee. If he had done so then undoubtedly a suit under section 92 of the Code of Civil Procedure was competent, for it has been held and the matter is settled by authority that a suit brought against a trustee *de son tort* can be under section 92 (I. L. R., 33 Calc. p. 789 at pp 805 and 806). In other words, such a suit will lie against a person who without title chooses to take upon himself the character of a trustee.

The learned District Judge has not referred to any evidence on this point, and in the view of the law which he took, it was hardly necessary for him to do so He states that it is quite immaterial whether Ram Bilas was a *mutawalli* or not.

The learned counsel for the respondents has referred to some evidence on this point He calls attention to the deposition of Nityа Nand, one of the plaintiffs in the case, which is printed at p. 1 of the respondents' book

In this statement we cannot find anything done or said by Nityа Nand for the purpose of showing that the first defendant Ram Bilas had taken upon himself the duties of a *mutawalli*

He mentions indeed something said or done by Bhagwan Das, defendant No. 6. That, however, is quite a different matter, and a reference to the plaint shows that no relief was being sought against Bhagwan Das. What the plaintiffs were asking for was the removal of Ram Bilas, defendant No. 1, from the possession of the trust property.

Another piece of evidence to which we will refer is printed at p 8 of the respondents' book. It seems that some inquiry was held by the Collector of Pilibhit in the year 1910 with regard to the administration of this trust property, and there is upon the record a statement made by Bhagwan Das in which he admits that some of the profits of this village had

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accumulated. Bhagwan Das undertook through the Collector to have the temple property repaired out of these accumulations.

Whatever may be the effect of anything done or said by Bhagwan Das, it seems to us perfectly clear that neither the statement made by Nitya Nand in court nor the admission made by Bhagwan Das before the Collector in 1910 can possibly be treated as evidence for the purpose of showing that Ram Bilas, the first defendant in the case, is a trustee *de son tort*.

As the question relating to the maintainability of this suit is a vital question in the case, we are of opinion that the hearing of the appeal ought not to proceed until the learned Judge has come to a proper finding which would enable us to dispose of that matter.

We observe that the fourth issue in the case was whether section 92 of the Code of Civil Procedure applied to the case. In his judgment the learned Judge states that when the case came up for hearing he deleted this issue Why he did so is not apparent, for on the pleadings it was one of the most important issues in the case.

The learned Judge will now have to decide the question whether or not Ram Bilas, defendant No. 1, is a trustee *de son tort* of the property in dispute. That will be the first issue before him, and after deciding that issue he will proceed to give a definite finding on the fourth issue which he deleted from the record, namely, whether section 92 of the Code of Civil Procedure applies to the case

It is probable that the action of the learned Judge in deleting this issue has misled the parties and prevented the production of evidence which would otherwise have been produced. We, therefore, deem it right to allow both sides to call such evidence as they can before the learned District Judge so as to enable him to decide the two issues upon which we call for findings. The findings of the learned District Judge will be submitted within two months from the date of the receipt of this Court's order and the usual period of ten days will be allowed for objections to the findings when they are received in this Court.

Issues remitted.

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay.

EMPEROR v. UMA DUTT MISIR *

1922
May, 3.

Criminal Procedure Code, section 514—Security to keep the peace—Proceedings for forfeiture of recognizance—Expiry of period of bond.

Where proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given, the fact that such period has expired is no bar to their continuance *In re Ram Chander Lalla* (1) distinguished. *Emperor* v *Rafa Ram* (2) referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandra Mukerji* and Pandit *Narmadeshwar Prasad Upadhiya*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

LINDSAY, J. :—The argument put forward in support of this application has the merit of ingenuity but I do not think it ought to be allowed to prevail.

The proceedings which are attacked were proceedings under section 514 of the Code of Criminal Procedure. The applicant, Uma Dutt Misir, was, by an order passed on the 14th of March, 1921 bound over to keep the peace for a period of one year. In or about the month of July, certain facts transpired which led to its being believed that Uma Dutt had been guilty of a breach of the conditions of the bond, and as a result of this information, proceedings were initiated against him under section 514. There can be no doubt that these proceedings were taken within the period provided by the bond. For one reason or another it became necessary to transfer the proceedings under section 514 from the court in which they were taken. It was held by this Court that those proceedings could only properly be taken in the court of the District Magistrate of Benares and not in the court of the Joint Magistrate who had taken up the case under section 514. An order was accordingly passed directing the District Magistrate of Benares to take the proceedings on to his own file. Instead of complying with this Court's order, the learned District Magistrate made over the case to a subordinate Magistrate, Mr. Gada Husain.

* Criminal Revision No. 165 of 1922, from an order of J. H. Darwin, District Magistrate of Benares, dated the 24th of March, 1922

(1) (1877) 1 C. L. R., 134.
(2) (1903) I L. R., 26 All., 202.

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Further application was made to this Court, which resulted in the proceedings taken in Mr Gada Husain's court being set aside as being without jurisdiction and the learned District Magistrate was directed to hold an inquiry *de novo*.

By the time all this happened, the period of one year limited by the bond had expired, and it is now contended that inasmuch as the period has elapsed, no proceedings under section 514 are possible. I have been referred to a case, *In re Ram Chunder Lalla* (1), which had already been dissented from by a Divisional Bench of the Allahabad High Court in *Emperor* v. *Raja Ram* (2), of the Calcutta High Court in which it was held that where no proceedings under section 514 were taken by a Magistrate within the period limited by the bond, no action could be taken under this section after the term of the bond had expired. This, however, is a different case There can be no doubt that action was taken within the period laid down in the bond and that the only reason why the case did not reach the stage of completion was that the learned District Magistrate had made a mistake in transferring the case from his own file to the court of a Subordinate Magistrate. It was this illegality in the procedure of the District Magistrate which led to all the delay. As I understand the position, the learned District Magistrate is now only carrying on the proceedings which were initiated within the period of one year from the date of the bond, namely, the 14th of March, 1921. In other words, the order of this Court was to direct the Magistrate to take up the case at the stage where he passed the illegal order and to continue the proceedings therefrom. I hold that there is no legal bar to the prosecution of this case under section 514, and I dismiss the application accordingly

Application dismissed.

(1) (1877) 1 C. L. R., 131
(2) (1903) I. L. R., 26 All., 202

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal

1922
May, 9

RAM SARUP (PLAINTIFF) *v.* RAM LAL AND OTHERS (DEFENDANTS) *

Act No IV of 1882 (Transfer of Property Act), section 101—Mortgage—Position of prior mortgagee who has acquired the rights of his mortgagor

The shield of a subsequent mortgagee who acquires the rights of a prior mortgagee is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor, or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), *Laxman Ganesh* v. *Mathurabai* (2) and *Baldeo Prasad* v. *Uman Shankar* (3) referred to. *Athan Kutti* v. *Kuttanat* (4) and *Mati-ullah Khan* v. *Banwari Lal* (5) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and Munshi *Kailas Chandra Mittal*, for the appellant.

Babu *Harendra Krishna Mukerji*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—These appeals arise out of two suits brought by a subsequent mortgagee for the recovery of the money due on two simple mortgages. The claims were resisted by a person who had purchased the mortgaged property in execution of a simple money decree due by the mortgagor. That person also held certain prior mortgages on the same property. He asserted that the plaintiff was not entitled to sue for the recovery of the money due on the subsequent incumbrance until he had paid the money due on the prior mortgages. The first court decreed the claim without requiring the plaintiff to pay the money due on the prior mortgages. The view taken by it was that the prior mortgages had ceased to subsist and that the defendant could not set up those mortgages as a shield against the claim brought by the subsequent mortgagee. The lower appellate court, however, held otherwise and granted a decree to the plaintiff subject to his redeeming the prior mortgages set up by the defendant respondent.

* Second Appeal No 1451 of 1920, from a decree of Abdul Halim, Subordinate Judge of Meerut, dated the 9th of September, 1920, modifying a decree of Pran Nath Aga, Munsif of Meerut, dated the 20th of April, 1920.

(1) (1894) I. L. R., 19 Calc., 1035.
(2) (1913) I. L. R., 38 Bom., 369.
(3) (1907) I. L. R., 32 All., 1.
(4) (1916) 37 Indian Cases, 756.
(5) (1908) I. L. R., 32 All., 133.

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It is urged on behalf of the plaintiff appellant that the prior mortgages had ceased to be subsisting, because no step had been taken to enforce them within the period allowed by law. The mortgagee, however, had purchased the mortgaged property in execution of a simple money decree due by the mortgagor, and it was not open to him to sue for the recovery of the money due on his prior mortgages after the rights of the mortgagor had merged in him. Section 101 of the Transfer of Property Act lays down that where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist, or such continuance would be for his benefit.

The ordinary rule, as laid down by their Lordships of the Privy Council in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), is that if a man is entitled to act in either of two ways, he shall be assumed to have acted according to his interest, and the presumption, therefore, is that the mortgagee intended to keep his prior incumbrances subsisting, in order that he might be able to use them to protect himself against any subsequent incumbrancer. That being so, the defendant respondent could set up these prior mortgages as a shield against the claims brought by the subsequent mortgagee.

The learned counsel for the plaintiff appellant contends that no such shield is available to a person who has purchased the mortgaged property otherwise than in execution of a decree on the prior mortgage; but he has not been able to cite authority in support of that proposition. He relies on the decision in *Athan Kutti* v. *Kuttanat* (2), but that was a case in which a suit was brought to redeem a usufructuary mortgage against a person who also held a simple mortgage of a subsequent date on the same property. The latter was barred by time. There were certain conditions in the simple mortgage which imposed fetters on the right of the mortgagor to redeem the former; and all that was laid down in that case was that the plaintiff was entitled to redeem the usufructuary mortgage irrespective of

(1) (1884) I. L. R., 10 Calc., 1035 at 1046.
(2) (1916) 37 Indian Cases, 756

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those fetters, and that as the liability of the mortgagor under the simple mortgage was quite independent of his liability under the usufructuary mortgage, the simple mortgage could not in any case be set up as a shield against the claim of the mortgagor to redeem the usufructuary mortgage. There was no covenant therein for tacking or consolidation and no shield was available. He has also relied on the decision in *Mati-ullah Khan* v. *Banwari Lal* (1), but that was not a case in which the mortgagee had purchased the equity of redemption in the mortgaged property. There was a certain person who had mortgaged the property in succession with two different persons and subsequently sold it to a third party. The third party made a mortgage in favour of a person who, thereafter, redeemed the first mortgage out of the money left with him for the purpose by his mortgagor. He subsequently filed a suit for the recovery of the money due on his mortgage and obtained a decree in satisfaction whereof the rights of the mortgagor were sold by auction and purchased by a person against whom an attempt was afterwards made by the intermediate mortgagee to enforce his mortgage. One of the defences taken by the auction purchaser was that the mortgagee, in satisfaction of whose decree he had purchased, had acquired the rights of the prior mortgagee by payment of his money, and it was held by this Court that he was entitled to use that mortgage as a shield against the claim of the intermediate mortgagee, if the right to enforce that mortgage was subsisting.

There is, however, a considerable difference between cases where a subsequent mortgagee has acquired the rights of a prior mortgagee by payment of the money due to him under section 74 of the Transfer of Property Act and cases where the rights of the mortgagors have merged in the mortgagee within the meaning of section 101 of the Transfer of Property Act. There is no question of merger in the former as there is in the latter. Under the latter section, if at any time the purchaser is sought to be deprived of the mortgaged property, it is open to him to set up his original rights as a prior mortgagee as a shield against any rights which might be claimed under a subsequent incumbrance. Having purchased the mortgaged property, he can redeem

(1) (1909) I L R, 32 All, 138

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any subsequent incumbrance, but he is under no obligation to do so. He can retain possession of the mortgaged property until an attempt is made by a puisne mortgagee to oust him by redemption or sale.

The shield of a subsequent mortgagee, who acquires the rights of a prior mortgagee, is essentially different in character from the shield of a mortgagee who acquires the rights of the mortgagor. The former can protect himself so long as the rights under the earlier mortgage subsist. In the case of the latter, his rights as a mortgagee merge in those of the mortgagor or remain in suspense, as it were, till they are needed for purposes of defence. So long as he retains the rights of the mortgagor, he is not affected by any question of limitation, for, as pointed out in *Laxman Ganesh v Malhunabai* (1), he cannot be required to sue for the recovery of the money due on his mortgage from his own property. Indeed, being both the mortgagee and the mortgagor, he cannot have any cause of action against himself.

It makes no difference how the rights of the mortgagor are acquired by the mortgagee. In *Baldeo Prasad v Uman Shankar* (2), a mortgagee, who had in the exercise of a right of pre-emption purchased the property mortgaged to him, was held to have a right to be repaid the money due in respect of his mortgage before a subsequent mortgagee could bring such property to sale in execution of a decree on a mortgage held by the latter

The other pleas taken in the memoranda of appeals have not been pressed A question was raised as to the right of the defendant respondent to claim interest beyond the date on which he got possession of the mortgaged property, but the lower appellate court has not awarded interest beyond the date on which possession was so obtained by the defendant respondent. The appeals, therefore, fail and we dismiss them with costs.

Appeals dismissed.

(1) (1913) I. L. R., 38 Bom., 369 at 372.
(2) (1907) I. L. R., 32 All., 1.

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal.

ABDUL KARIM KHAN (DEFENDANT) v. MUHAMMAD JAN (PLAINTIFF) AND AZIZ-UR-RAHMAN KHAN (DEFENDANT) *

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Civil Procedure Code (1908), order II, rule 2—Annuity—Suit for arrears—Suit dismissed as premature and appeal subsequently withdrawn—Later suit for subsequent instalment decreed—Another suit thereafter for the original arrears.

An annuitant sued for arrears of his annuity from 1914 to 1917. On the date fixed for hearing the parties were absent, and the suit was dismissed; but it was dismissed rather because the court found it to be premature than on account of the absence of the parties. The plaintiff applied to have the order of dismissal set aside, but his application was rejected. He appealed against this order of rejection, but subsequently withdrew the appeal. Meanwhile the plaintiff sued for a further instalment of the annuity, which had fallen due on the 1st of July, 1917, and obtained a decree. He then (after the appeal above-mentioned had been withdrawn) sued again to recover the arrears of the annuity which had formed the subject of his original suit.

Held that the suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure, 1908.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Dr. *S. M. Sulaiman* and Maulvi *Mukhtar Ahmad*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ.:—We are concerned in this case with a claim which was brought by the first respondent Munshi Muhammad Jan for the recovery of arrears of an annuity of Rs. 660 per annum.

The annuity was payable in equal moieties on the 1st of January and the 1st of July of each year and the period covered by the present suit ran from the 1st of January, 1914, to the 1st of July, 1919.

The courts below have decreed the claim in full and the question raised before us is whether or not, in view of certain proceedings between the parties, the items from the 1st of January, 1914, up to and including that of the 1st of January, 1917, are claimable in this suit.

In order to explain the matter which arises for decision, it is necessary to refer to the following facts:—

On the 28th of June, 1917, the plaintiff, Munshi Muhammad Jan, brought a suit against these defendants to recover the instalments of the annuity which had fallen due from the 1st of January, 1914, up to the 1st of January, 1917. This suit was suit No. 166 of 1917, and on the 31st of July, 1917, the parties were absent. The Subordinate Judge wrote

* Second appeal No. 1181 of 1920, from a decree of V. E. G. Hussey, District Judge of Moradabad, dated the 18th of May, 1920, confirming a decree of Lalta Prasad Johri, Subordinate Judge of Moradabad, dated the 18th of November, 1919.

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a judgment dismissing the suit. In his order of that date he mentions that the parties were absent. He also went on to say that because an appeal was pending with respect to a certain sale deed, the suit appeared to him to be premature, and he purported to dismiss the suit not on the ground of absence of the parties but on the ground that the suit had been brought before time.

The plaintiff, after this order of dismissal had been passed, made an application to the Subordinate Judge to have the order of dismissal set aside. Clearly that was an application made to the court in accordance with the provisions of order IX, rule 4.

That application for setting aside the order of dismissal was rejected on the 10th of November, 1917.

Against that order of rejection the plaintiff filed an appeal in the court of the District Judge, and on the 2nd of March, 1918, that appeal was withdrawn and dismissed on the application of the present plaintiff.

Meantime the instalment of the annuity which fell due on the 1st of July, 1917 had become payable and a suit to recover that particular instalment was brought in the court of the Munsif on the 22nd of December, 1917. That suit was tried out and the plaintiff got his decree on the 2nd of April, 1918

The point which has been made here on behalf of the defendants and which was raised unsuccessfully by them in the courts below is that when the plaintiff brought this claim on the 22nd of December, 1917 in respect of the half-yearly instalment of the annuity which had become payable on the 1st of July, 1917 he was bound to include in his claim a claim for all other instalments which had become due up to that date and with respect to which a claim would have been within limitation.

Order II, rule 2, is consequently put up as a bar by the defendants.

The plaintiff seeks to avoid the operation of order II, rule 2, in this way. He says that at the time he filed his suit on the 22nd of December, 1917, an appeal was still pending in the court of the District Judge, an appeal relating to the suit in which the claim was for the arrears of the earlier years, that is to say, from the 1st of January, 1914, up to the 1st of January, 1917. It is argued that while that

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appeal was pending when the second suit was filed, it was not open to the plaintiff to include the earlier claim in the second suit.

There are two answers to this contention. In the first place, it is obvious that after the plaintiff's application to have the order of dismissal in default set aside was rejected, he had no right of appeal at all. In the next place, even if he assumed mistakenly that he had a right of appeal, it is clear that that appeal was withdrawn from the court of the District Judge on the 2nd of March, 1918, that is to say, a full month before the decree was passed in the second suit which was brought on the 22nd of December, 1917. In other words, the appeal was withdrawn while the second suit was still pending. In these circumstances, we think, the plaintiff cannot be heard to say that he is in any way protected against the operation of order II, rule 2, by the fact that he had an appeal pending in the court of the District Judge at the time the second suit was filed. After the appeal was withdrawn any protection which might have accrued to the plaintiff by reason of the appeal having been filed was taken away and his proper course then was to apply to the court in which the suit was pending and to ask for amendment of the claim and permission to include in the claim a claim for the years 1-1-'14 to 1-1-'17. We hold that the view taken by the court below on this point of law is erroneous and the appeal must, therefore, be allowed to this extent. The result is that allowing the appeal, we direct that the claim of the plaintiff regarding the items accruing due prior to the 1st of January, 1918, is dismissed. The rest of the claim is decreed with proportionate costs against the defendants. The defendant appellant is entitled to proportionate costs in all three courts.

Decree modified.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal

HANS RAJ AND OTHERS (DEFENDANTS) *v.* MUSAMMAT SOMNI (PLAINTIFF).*

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Act No. IV of 1882 (Transfer of Property Act), section 51—Alienee from Hindu widow without legal necessity—Improvements made by alienee on land so obtained

A Hindu widow mortgaged with possession certain property which had been of her deceased husband—as was subsequently found—without any

* Second Appeal No. 79 of 1921, from a decree of R. L. Yorke, Additional Judge of Gorakhpur, dated the 23rd of November, 1920, reversing a decree of Puran Chandra Consul, City Munsif of Gorakhpur, dated the 15th of April, 1920

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legal necessity for so doing, and the mortgagee proceeded to erect a house on the land so mortgaged. The mortgagor died, and her co-widow, on whom the mortgaged land devolved by survivorship, sued for possession and for removal of the house.

Held that the mortgagee was not entitled to claim the benefit of section 51 of the Transfer of Property Act, 1882. A person dealing with a Hindu widow would ordinarily know that she has only a life interest and he can reasonably be expected to make inquiries as to whether there is any legal necessity for the transfer in his favour. *Raja Rai Bhagwat Dayal Singh* v. *Ram Ratan Sahu* (1) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *S. S. Sastry* (for Munshi *Haribans Sahai*), for the appellants.

Munshi *Iswar Saran* and Munshi *Harnandan Prasad*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in this appeal relates to a house situated in Gorakhpur city. The house was originally an enclosure, belonging to Chunni. Chunni died leaving two widows, Musammat Pati and Musammat Sonni, and a daughter, Musammat Ganga Dei. In 1910 a partition took place whereby the disputed enclosure was allotted to the share of Musammat Pati. On the 7th of September, 1914, Musammat Pati mortgaged that land with Hansraj for Rs. 150, stating that Rs. 25 out of the same were required for the repairs of her own dwelling house and Rs. 125 for giving a caste dinner in connection with the death ceremonies of her husband. Her husband had died about four years earlier. The court of first instance found that Rs. 25 had been borrowed for the purpose of repairing the dwelling house occupied by Musammat Pati, which was in a dilapidated condition, but there was no legal necessity for borrowing Rs. 125 for giving a caste dinner. It, however, awarded Rs. 600 to the mortgagee on account of the cost of constructing a house over the disputed land after the mortgage. On appeal the Additional District Judge came to the conclusion that there was no legal necessity whatever for the mortgage and that the mortgagee was not entitled to claim the cost incurred by him in constructing a house on the disputed land. He accordingly allowed the claim and directed the defendant to remove the materials of the house constructed by him, within two months from the date of the decree. The defendants have come here in second appeal and the main points argued on their behalf are (1)

(1) (1921) 20 A. L. J., 26

that on the facts found the mortgagee was entitled to claim Rs. 150, the entire amount lent by him to Musammat Pati, and (2) that in any event he was entitled to the value of the improvements made by him, under section 51 of the Transfer of Property Act (Act IV of 1882).

With regard to the first point it is stated by the learned Additional District Judge that Musammat Pati's means were sufficient to enable her to repair the house which she was occupying, and that the caste dinner had already been given by Musammat Somni within a fortnight of the death of her husband. In view of those facts it can hardly be said that there was any legal necessity for Musammat Pati to have borrowed the money for repairing the house or to give another dinner to the people of her caste in response to their wishes in the matter. The learned Additional District Judge observes that it was usual and perhaps the duty of the widows to give a caste dinner soon after the death of their husband and that such a feast had been given by Musammat Somni. We are not, therefore, in a position to say that a second feast was necessary and that the mortgage was justified.

With regard to the second point, section 51 of the Transfer of Property Act has no application. It applies only to the case of a transferee of immovable property who makes any improvement in the property, believing in good faith that he is absolutely entitled thereto. But in the case of a Hindu widow a person dealing with her would ordinarily know that she has only a life interest and he can reasonably be expected to make inquiries as to whether there was any legal necessity for the mortgage and whether the widow had any right to make the transfer. The mortgagee cannot be said here to have acted in good faith in dealing with such a widow so as to affect more than her life interest. The learned counsel for the defendants appellants relies on the decision in *Raja Rai Bhagwat Dayal Singh* v. *Ram Ratan Sahu and others* (1), but in that case the sale was held to have been partially made for legal necessity, and the improvements made consisted of the erection of seven or eight big tanks and the construction of a dyke for the purpose of irrigation, which had the effect of permanently increasing the rental value of the disputed property. Musammat Pati is

(1) (1921) 20 A. L. J., 26

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dead and her interest has reverted now to the plaintiff by survivorship. It is not necessary to enter into the other questions raised in this appeal.

The learned counsel for the defendants appellants asks for three months' time for removing the materials of the house constructed by the defendants appellants.

The appeal is dismissed except in so far that we extend the time for the removal of the materials to three months from the date of the decree of this Court. The defendants appellants will bear their own costs and pay those of the plaintiff respondent.

Appeal dismissed.

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Before Mr Justice Gokul Prasad and Mr Justice Stuart.

SITAL SINGH AND OTHERS (DEFENDANTS) v BAIJNATH PRASAD (PLAINTIFF) AND MAHANT PURNANAND SADHU UDASI AND OTHERS (DEFENDANTS) *

Civil Procedure Code (1908), *order XXXIV, rules 4 and 5—Mortgage—Preliminary decree made on a compromise—Application for decree absolute—Plea of satisfaction of preliminary decree out of court*

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree Such proceedings are not to obtain any order absolute for sale as used to be the case under section 89 of the Transfer of Property Act, but they are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. *Ramji Lal* v *Karan Singh* (1) referred to

Where the preliminary decree is based on a compromise and is in terms thereof, and is not prepared in strict accordance with order XXXIV, rule 4, it is open to the judgment-debtors, on application made for a final decree, to prove that the preliminary decree has been satisfied out of court *Mangar Sahu* v. *Bhatoo Singh* (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S M Sulaiman*, Mr. *Abu Ali*, Babu *Piari Lal Banerji* and Munshi *Sheo Dehal Sinha*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents

GOKUL PRASAD and STUART, JJ :—This is an execution second appeal arising under the following circumstances :—

A compromise decree was passed on the 14th of August, 1917 in favour of Purnanand and Bhagwan Ram against Sital Singh and others, judgment-debtors, under which Rs. 2,950 were to be realized by sale of certain hypothecated property, but in case the judgment-debtors paid Rs. 2,500 to the decree-holders within three months of the date of the

* Second Appeal No. 99 of 1921, from a decree of B J. Dalal, District-Judge of Allahabad, dated the 27th of July, 1920 reversing a decree of Man Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 2nd of February, 1920

(1) (1917) I L R., 39 All., 582.
(2) (1920) 57 Indian Cases, 473.

decree, the judgment-debtors and their property would be released from all liability under the decree or, in other words, the decree for sale would cease to exist.

On the 30th of November, 1918 the present application was put in by Baijnath, a transferee of the decree from the original decree-holders, for a decree absolute for Rs. 850, the balance alleged to be due under the decree on the allegation that the judgment-debtors had already paid Rs. 2,100 The judgment-debtors preferred an objection to the preparation of the decree absolute on the ground that they had paid the whole amount of the decree in the following manner:— They had paid Rs. 25 to the original decree-holders on the 6th of November, 1917 that is, within the three months allowed by the decree and obtained an extension of time up to the 2nd of December, 1917 to pay the balance and that on the 29th of November, 1917 that is within the extended time allowed by the decree-holders, they paid Rs. 2,500 to them, and thus the whole decree was satisfied in the manner agreed upon between the parties. This objection was allowed by the learned Subordinate Judge and the respondent's application for preparation of a decree absolute was dismissed.

On appeal by the decree-holders the learned District Judge has agreed with the first court in holding that the arrangement set up by the judgment-debtors had been proved, but he disallowed the objection of the judgment-debtors on the ground that the preparation of the final decree was a step in execution of the preliminary decree and as the settlement pleaded by the judgment-debtors had not been certified to the court, it could not be recognized in the execution department. He accordingly allowed the appeal and directed the preparation of the decree absolute for sale as prayed by the decree-holders. The judgment-debtors come here in second appeal and their contention is that the learned Judge of the lower appellate court has erred in holding that the proceedings for obtaining a decree absolute for sale are proceedings in execution This contention seems to have force, and having regard to the repeal of sections 88 and 89 of the Transfer of Property Act and the enactment of order XXXIV of the Code of Civil Procedure (Act V of 1908), the proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree.

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Such proceedings are not to obtain any order absolute for sale, as used to be the case under section 89 of the Transfer of Property Act, but they are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. This view of ours finds support from the case of *Ramp Lal* v. *Karan Singh* (1), where this matter has been fully discussed.

It is, however, urged by Dr. *Katju* on behalf of the respondents that having regard to order XXXIV, rule 5, of the Code of Civil Procedure, a payment like the one alleged by the judgment-debtors to have been made out of court would not be valid and could not be recognized. In our opinion this contention must fail because the decree originally prepared was not prepared in strict accordance with the provisions of order XXXIV, rule 4, and hence order XXXIV, rule 5, would not apply to this decree. It was a decree based on a compromise arrived at between the parties and the terms of the compromise were embodied in the decree. Strictly speaking, order XXXIV, rule 5, has no application to such a decree. This view of ours finds support from the well considered judgment of Mr. Justice JWALA PRASAD in the case of *Mangar Sahu* v. *Bhatoo Singh* (2). There is nothing against public policy in the compromise arrived at between the parties in the present case on which the decree was based and we can find no provision of law which prohibits the payment of a compromise decree out of court. There is, therefore, no bar to the judgment-debtors setting up and proving the adjustment set up here. Before a court can pass a decree absolute for sale, it has to find out the amount which is due to the decree-holder for which a decree absolute can be passed. On the findings arrived at concurrently by the two lower courts in this case, nothing is due to the decree-holders and the whole amount of the decree has been paid up according to the arrangement arrived at between the decree-holders and the judgment-debtors.

We, therefore, allow the appeal, set aside the decree of the lower appellate court, and restore that of the court of first instance with costs in all courts.

Appeal decreed.

(1) (1917) I. L. R., 39 All., 532.
(2) (1920) 57 Indian Cases, 473.

Before Mr. Justice Stuart and Mr. Justice Kanhaiya Lal

MAHARAJA OF JAIPUR AND ANOTHER (DEFENDANTS) *v.* SURJAN SINGH (PLAINTIFF).* 1922 *May*, 12

Act No. I of 1872 (Indian Evidence Act), section 116—Suit for possession of house—Claim by decree of a third party as against ground landlord claiming by escheat—Estoppel.

A house standing within an area owned by J was occupied by a tenant, R, who paid rent to three persons successively, other than J. The last of these three persons on her death bequeathed the house to S, and about that time R vacated the house, which was then let to one A by J, who claimed that the house had escheated to him as the ground landlord.

Held, on suit brought by S for possession of the house, that R was an immaterial party, as he had vacated the house, and that there could be no question of estoppel as against either J or A, as neither of them claimed through R. *Tadman v. Heaman* (1) referred to.

THE facts of this case were as follows :—

One Sukharaji, by caste a Thakurain, died possessed of a house situate within 35 acres of land in Katra, Allahabad, belonging to H. H. The Maharaja of Jaipur. On her death, Sukkho Nut took possession of the house without any right, as it appeared that there had been no deed of transfer from Sukharaji to Sukkho Nut. Before his death Sukkho Nut made a will devising the house in question to one Musammat Raghunathi who was his mistress. Raghunathi, in her turn, bequeathed by a will, dated the 30th of January, 1915, the said house to one Surjan Singh. It appeared that the house was occupied by a tenant Ramji Sahai, who had been living in it from the time of Musammat Sukharaji, but who had paid rent after Sukharaji's death to Sukkho Nut and, after him, to Raghunathi during her life-time. This tenant, after the death of Raghunathi, recognizing the paramount title of the Maharaja of Jaipur, attorned to him and paid rent to the servants of the Maharaja for such time as he continued to live in the house. On the 6th of October, 1916 he left the premises and on the 9th of October, 1916 Pandit Amar Nath was put in possession of the house as the tenant of the Maharaja Saheb by the latter's servants. Surjan Singh first brought a suit against Ramji Sahai alone after he had left the house and Pandit Amar Nath had occupied it, claiming rent for the period that he had been in occupation of the house since the death of Raghunathi. This suit was decreed. Subsequently Surjan Singh brought this suit for ejectment and

* Second Appeal No. 255 of 1921, from a decree of Gauri Shanker Tewari, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Allahabad, dated the 5th of April, 1921, reversing a decree of Shibendra Nath Banerji, Additional Munsif of Allahabad, dated the 26th of December, 1918.

(1) (1893) 2 Q. B., 168.

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for mesne profits against Ramji Sahai and Pandit Amar Nath. The Maharaja Saheb of Jaipur was made a party to it, on his own application, by order of the court.

The court of the Additional Munsif dismissed the suit on the ground that Sukharaji's death having taken place within 12 years of the suit, and the possession of Sukkho Nut and those that followed him not having ripened into full ownership by 12 years' adverse possession, the plaintiff had failed to show any title in him. On appeal the learned Judge of the Small Cause Court exercising powers of a Subordinate Judge decreed the suit *in toto*, holding that though Ramji Sahai was let into possession of the house originally by Musammat Sukharaji and though the title of the plaintiff was defective by reason of Sukharaji's death having taken place within 12 years of the suit, yet not only was Ramji Sahai estopped from denying the plaintiff's title as he had continued to pay rent to Sukkho Nut and Raghunathi with full knowledge of their defective title, but Pandit Amar Nath and the Maharaja, too, were estopped because they had come into possession of the house collusively through Ramji Sahai

Hence this appeal.

Dr. *S. M. Sulaiman* (with him Pandit *Jagjiwan Nath Takru* and Munshi *Shiv Prasad Sinha*), for the appellants, contended that the lower appellate court was wrong in holding that the Maharaja and Amar Nath were estopped from denying the title of the plaintiff. Even Ramji Sahai would not be estopped from denying the plaintiff's title to whom he never paid any rent and who at best claimed only a derivative title by virtue of the will executed by Raghunathi in his favour. He referred to *Lal Mahomed* v. *Kallanus* (1).

Munshi *Haribans Sahai*, for the respondent, laid great stress on the finding of the lower appellate court that Amar Nath and the Maharaja had by colluding with Ramji Sahai taken possession of the house and, therefore, they were rightly held to be estopped : *Pasupati* v. *Narayan* (2).

[Dr. *S. M. Sulaiman* referred to *Annayyan* v *Chinnan* (3)].

Munshi *Haribans Sahai* referred to *Girdhari Lal* v. *Kallu Mistri* (4).

(1) (1885) I. L. R., 11 Calc., 519
(2) (1889) I. L. R., 13 Mad., 395
(3) (1909) I. L. R., 33 Mad., 366.
(4) (1913) 11 A. L. J., 341.

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Dr. *S. M. Sulaiman* was not called upon to reply

STUART and KANHAIYA LAL, JJ :—The facts of the suit out of which this appeal arises can be stated very shortly as follows :—There is a small house in Katra, Allahabad City, standing within an area of 35 acres. This area is owned by His Highness the Maharaja of Jaipur. This small house was previously occupied by a woman called Musammat Sukharaji. She died about 1907. Before her death she had let the house to a man named Ramji Sahai. He continued to occupy it after her death. There was a man called Sukkhu Nut with whom Sukharaji had been living as his mistress. On her death, Ramji Sahai continued to pay rent to Sukkhu Nut. Then Sukkhu Nut died. After his death Ramji Sahai paid rent to Musammat Raghunathi, who was a subsequent mistress of Sukkhu Nut. When Musammat Raghunath died she made a will in favour of a man called Surjan Singh, the plaintiff respondent in this appeal, by which she bequeathed him the house in question We have it that Ramji Sahai vacated the premises on the 6th of October, 1916 Three days after he had vacated the premises, Pandit Amar Nath took possession of them under the permission of the Maharaja of Jaipur, who claimed the house as having escheated to him after the death of Sukharaji. Surjan Singh instituted the suit out of which this appeal arises for the ejectment of Ramji Sahai and Pandit Amar Nath. The suit was instituted on the 14th of March, 1918 about eighteen months after Ramji Sahai had left the premises. The object, apparently, in including Ramji Sahai as a defendant when he palpably could not be ejected, was to raise a plea which has been decided in the plaintiff's favour by the lower appellate court Pandit Amar Nath naturally put up the defence that he was holding with the permission of the Maharaja and, in consequence, the Maharaja was joined as a defendant. Ramji Sahai took no interest in the decision of the suit. He would not take any interest in it as he had left the premises. He contested the suit, but not seriously. The Maharaja of Jaipur and Pandit Amar Nath took as their defence the obvious defence as to the title of Surjan Singh The Maharaja claimed by escheat but he was content to put the plaintiff to proof of his title. Then a plea was put forward that the Maharaja and Amar Nath could not question Surjan Singh's title under section 116 of the Indian Evidence Act This plea of estoppel has found favour with the lower appellate

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court but it does not find favour with us. It is perfectly clear that neither the Maharaja nor Amar Nath was a tenant of the house in question, nor did they claim through Ramji Sahai who was the tenant; and, further, there was then no tenancy. There can be no estoppel against them. The learned Subordinate Judge has found collusion between Ramji Sahai and Amar Nath. On the facts as he has found, there was no collusion at all. In any circumstances, the ordinary doctrine which was laid down in *Tadman* v. *Henman* (1), that third persons not claiming possession of land under the tenant are not estopped, has application. The Maharaja and Amar Nath, who are the sole appellants in this case, have every right to put Surjan Singh to proof of his title. They put him to proof of his title in the court below and there can be no doubt as to the fact that he has been unable to establish any title. The question of the estoppel of Ramji Sahai is of no importance in the decision of this appeal, for he has not appealed. We, therefore, decree this appeal and direct that Surjan Singh's suit against His Highness the Maharaja of Jaipur and Pandit Amar Nath stand dismissed and we direct that Surjan Singh pay his own costs in this appeal and the costs of the Maharaja of Jaipur and Pandit Amar Nath in all courts.

Appeal decreed.

Before Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

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MUHAMMAD SULAIMAN (DEFENDANT) *v.* SAKINA BIBI (PLAINTIFF) AND BAD-ULLAH (DEFENDANT).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 41—*Ostensible owner*:—*Manager left in charge of property the owner of which had gone on a pilgrimage*.

Plaintiff, who was the owner of a house in Cawnpore, went on a pilgrimage to Mecca, leaving the house in charge of an agent. When the plaintiff had been absent about three years, the agent got his own name entered on the Municipal register in place of the owner, and thereafter sold the house as his own. Plaintiff returned before the expiration of six years from her departure and sued for recovery of possession.

Held that the vendor could not be considered as an "ostensible owner" within the meaning of section 41 of the Transfer of Property Act, 1882 and the plaintiff was entitled to a decree. *Jamna Das* v. *Uma Shankar* (2) *Merwanji Muncherji Cama* v. *The Secretary of State for India in Council* (3) and *Partap Chand* v. *Saiyda Bibi* (4) referred to.

* Second Appeal No. 231 of 1921, from a decree of E. H. Ashworth, District Judge of Cawnpore, dated the 20th of December, 1920 reversing a decree of Kashi Prasad, Subordinate Judge of Cawnpore, dated the 13th of November, 1919.

(1) (1893) 2 Q. B., 168.
(2) (1914) I. L. R., 36 All., 308
(3) 1915) 19 C. W. N., 1056.
(4) (1901) I. L. R., 23 All., 442

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THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman* and Dr *Kailas Nath Katju*, for the appellant.

Mr. *E. M. Howard* and Mr. *B. E. O'Conor*, for the respondents.

STUART and KANHAIYA LAL, JJ.:—The dispute in this appeal relates to a house situate in Cawnpore city. The house belonged to Musammat Sakina, the plaintiff respondent. In the beginning of 1912 she went to Mecca, leaving the house in charge of a relation of hers named Bad-ullah. Before leaving for Mecca, she had executed a will by virtue of which she had bequeathed an interest in that house to Bad-ullah on her death. At Bombay she got herself re-married to a person named Nur Jamal and went with him to Mecca where she stayed for two years. On her return she went to Delhi where she stayed with her husband.

Meanwhile an application was made by Bad-ullah to the Municipal Board, Cawnpore, on the 31st of May, 1915 stating that he was not aware of the whereabouts of Musammat Sakina who had gone on pilgrimage, nor certain whether she was dead or alive, and praying that the house might be entered in his name, as he was her only heir. This application was granted and the name of Bad-ullah was entered in the Municipal house-tax register in the place of Musammat Sakina. On the 30th of September, 1917 he sold the house for Rs 2,500 to the defendant appellant, and the question for consideration in this appeal is whether the plaintiff is bound by that sale. The court of first instance found that the defendant appellant had taken reasonable care to ascertain the title of Bad-ullah before taking a sale deed from him and that he had acted in good faith and purchased the house for valuable consideration. The lower appellate court, however, held that Bad-ullah was not the ostensible owner of the house with the express or implied consent of Musammat Sakina and the sale was not, therefore, binding on her. That finding is challenged here. On the question as to whether the defendant appellant had made reasonable inquiries before purchasing the property, the finding of the lower appellate court was that he had done so, and stress is laid on behalf of the defendant appellant on that finding as militating against the decree which the lower appellate court has passed in favour of the plaintiff.

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It appears from the statement of the defendant appellant himself that he was aware that Musammat Sakina was originally the owner of the disputed property. He had ascertained that fact when he examined the Municipal house-tax register. Had he made a further inquiry, he would have learnt that the name of Bad-ullah was substituted in her place by means of an application in which Bad-ullah had admitted that he was not aware whether Musammat Sakina was dead or alive. Musammat Sakina had been absent from Cawnpore for not more than six years. The defendant appellant states that he had made inquiries from certain neighbours and was led by them to believe that Bad-ullah was the owner of the house, but that inquiry could hardly be treated as sufficient in view of the fact that he knew that Musammat Sakina was the original owner of the house and no satisfactory information was available as to whether she had actually died. The presumption of death could not have been made before the lapse of seven years. Bad-ullah was only the manager of her property, and, as pointed out in the case of *Jamna Das* v. *Uma Shankar* (1), the possession of a manager cannot be treated as sufficient evidence of ostensible ownership with the consent, express or implied, of the real proprietor, within the meaning of section 41 of the Transfer of Property Act. The entry of the name of Bad-ullah in the house-tax register was only made for the purpose of assessment and collection of house-tax and was not intended for registering title, and as their Lordships of the Privy Council say in *Merwanji Muncherji Cama* v. *The Secretary of State for India in Council* (2), such an entry is not always enough to induce a person to think that the person whose name was entered was the proprietor and had a right to sell the property which was entered in his name. In *Partap Chand* v. *Saiyida Bibi* (3) a Government official owning zamindari property had caused that zamindari property to be recorded in the revenue papers in the names of his young sons and the latter subsequently sold portions of the property and mortgaged others. The vendee and the mortgagee had satisfied themselves that the property had been recorded for some years in the names of the sons but had made no further inquiries as to whether the property had really belonged to the sons or not. It was held by this Court that the transferee,

(1) (1914) I. L. R., 36 All., 338
(2) (1915) 19 C. W. N., 1056.
(3) (1901) I. L. R., 23 All., 442

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though acting in good faith, had not taken reasonable care to ascertain that the transferor had power to make the transfer.

On the facts found, it cannot, therefore, be said that the inquiry made by the defendant appellant was sufficient. In fact what he had already learnt was sufficient to put him on his guard and induce him to make further inquiries before taking a sale deed from a person who had practically got his name entered in the Municipal house-tax register either under some mistaken notion or by fraud. The plaintiff appellant explains in her statement that she was under the impression that the rent of the house was being utilized in the repairs of a certain mosque, and no adverse inference can be drawn from the fact of her having omitted to claim or realize rent from the person who was in charge of the house whilst she was away. We do not consider that section 41 of the Transfer of Property Act is applicable, and dismiss this appeal with costs

Appeal dismissed

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal

BALNATH AND ANOTHER (PLAINTIFFS) *v* MUHAMMAD ISMAIL (DEFENDANT) *

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May, 16.

Act No XX of 1863 (Religious Endowments Act), sections 3 and 7—Powers of committee of management of religious endowments—Lease—Renewal of lease in favour of another thekadar—Position of tenant of former thekadar refusing to vacate

It is competent to a committee appointed under the provisions of sections 3 and 7 of the Religious Endowments Act, 1863, to grant leases of the immovable property of the trust which such a committee represents, for a period of five years

Where one such lease for five years had expired and a fresh lease for a similar period had been granted to another thekadar, it was *held* that a person who was holding over on some kind of an arrangement with the former lessee was in the position of a mere trespasser, and it was not necessary for the new lessees to serve him with a formal notice of ejectment.

The facts of this case are fully set forth in the judgment of the Court.

Dr. *Surendra Nath Sen*, Dr. *S. M. Sulaiman* and Munshi *Baleshwari Prasad*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ.:—We have heard counsel on both sides in this appeal and have come to the conclusion that the judgment of the lower appellate court is

* Second Appeal No 1255 of 1920, from a decree of T. K Johnston, District Judge of Agra, dated the 11th of September, 1920 reversing a decree of Kanleshar Nath Rai, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Agra, dated the 29th of June, 1920

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wrong and must be set aside and the decree of the court of first instance restored.

The suit was a suit in ejectment brought by two plaintiffs, Rajnath and Banke Lal.

It appears that there is in Agra a body known as the Islamia Committee which is entrusted with the duty of looking after the Jama Masjid.

It appears that attached to the Masjid there are certain shops and, for the purpose of providing funds for the upkeep of the mosque, it has been the practice of this Committee to make arrangements for the leasing out of these shops so as to secure a regular income.

In their plaint the plaintiffs stated that they were the lessees of these shops on behalf of the Islamia Committee under a lease executed in their favour for a period of five years with effect from the 1st of April, 1919. The allegation was that Muhammad Ismail was in possession at the time the lease was granted in favour of the plaintiffs. He was told to quit, but refused to give up possession: hence this suit for ejectment and also for damages in the way of rent for occupation.

The defendant took a number of pleas. He asserted, in the first place, that the plaintiffs had no title to bring a suit as they were not lawfully lessees on behalf of the Islamia Committee. It was pleaded that the Islamia Committee had no power to give these plaintiffs a lease for the shops for a period of five years. The defendant also denied that he was the tenant of the plaintiffs. Further, it was pleaded that, in any case, if he was deemed to be the plaintiffs' tenant, the suit was not maintainable inasmuch as no proper notice to vacate had been given to him. The court of first instance decreed the suit, but the lower appellate court has reversed the first court's decree, and the first question we have to consider is the legal position of the plaintiffs in the present case.

The view taken by the Judge was that according to Muhammadan law the *mutawalli* of a trust property has no authority to grant a lease of house property for a period exceeding one year. In the view of the learned Judge the Islamia Committee stood in the same position with regard to the property in question as a *mutawalli*. Consequently, the learned Judge was of opinion that the lease in favour of the

plaintiffs conveyed no valid title to them.

In our opinion this view of the learned Judge is erroneous.

We have to refer, in the first instance, to the Bengal Regulation XIX of 1810. That was a Regulation passed in order to secure the due appropriation of rents and produce of lands granted for the support of mosques, Hindu temples, colleges and other pious purposes, and from the preamble to the Regulation it is made to appear that this legislation was undertaken by reason of the fact that there was mismanagement or want of management on the part of persons responsible in connection with property which had been endowed for the upkeep of religious buildings such as those which we have mentioned. It was declared, therefore, by the Regulation (section 2) that the general superintendence of all lands granted for the support of mosques, Hindu temples, colleges and for other pious and beneficial purposes, was vested in the Board of Revenue and Board of Commissioners in the several districts subject to the control of these Boards, respectively.

The words of this section are as general as they can be, and it is to be noticed that the language of the section itself imports no restriction on the power of the Board of Revenue in the management of the lands referred to in the section. We may also in this connection refer to the terms of section 4 of the Regulation which lays down that in cases where buildings have fallen into decay and cannot be conveniently repaired, the Boards shall recommend that they be sold by public auction or otherwise disposed of as may appear most expedient.

This arrangement for the management of property dedicated to the support of religious institutions remained in force for many years but was ultimately put an end to by the provisions of the Religious Endowments Act XX of 1863. It was then declared that it was no longer expedient that the Board of Revenue should be entrusted with the powers of management assigned to it under the Bengal Regulation, and arrangements were made whereby the duties and powers of the Board of Revenue were to be assigned to Committees, or, in cases where there were properly appointed trustees of the property, for the transfer of the Board's powers to these trustees. The relevant section we have to consider in this connection is section 7, which lays down that "in all cases

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described in section 3 of the Act the Local Government shall once for all appoint one or more Committees in every division or district to take the place, and to exercise the powers, of the Board of Revenue and the local agents under the Regulations hereby repealed "

There can be no doubt that the Islamia Committee is a committee which was appointed under section 7 of Act XX of 1863, and, consequently, it must be taken that they were appointed to take the place of and to exercise the powers of the Board of Revenue.

The learned Judge, as we have said, was of opinion that when the Board of Revenue took over the duties of superintendence under Regulation XIX of 1810, it was necessarily governed by the rules of Muhammadan law relating to the powers of a *mutawalli* to lease trust property. We can find no warrant for this opinion in the language of the Regulation itself, and indeed, as we have pointed out, the language of section 4, which directed that the Board should in certain cases recommend the sale of religious buildings, is altogether inconsistent with the provisions of Muhammadan law. It seems to us that the proper view is that in taking over the duties of management of these trust properties the Board of Revenue was entrusted with all reasonable powers which might be exercised for the benefit of the trust.

We may mention, moreover, that the provisions of the Muhammadan law are not quite so rigid as the learned Judge seems to have understood It is quite true that there was a rule laid down with regard to house property that a *mutawalli* should not in general be authorized to make a lease of such property for a period longer than one year, but there was this qualification attached to it, namely, that in all cases the Qazi might empower the *mutawalli* to grant leases for longer periods if he thought that such a grant was for the benefit of the trust estate.

If we were really called upon to decide whether the action of the Islamia Committee in leasing out this property for a period of five years to the plaintiffs was justifiable, we should have no difficulty in finding that this course is really in the best interests of the property. It could hardly be expected in modern times that any person would be willing to take a lease of a shop from which he would necessarily have to be removed at the expiry of one year. Further, it is not

to be doubted that this arrangement by which the Committee hands over the control of the property to a *thekadar* for a period of five years, is, from their point of view, a most convenient arrangement. It secures to the Committee a regular income which they can collect without any trouble. The Committee is saved the expense and trouble of maintaining a staff to collect the rents and otherwise look after the property, and, further, it seems to be quite clear that by this arrangement they are enabled to get as high a rent as they could possibly expect to obtain. The procedure seems to be that the Committee put up the *theka* for auction for a period of five years and hand over the *theka* to the highest bidder.

We are of opinion, therefore, that no question can possibly arise regarding the right of the present plaintiffs to maintain this suit in ejectment. We have read the document by which the *theka* was granted to the plaintiffs, and from that it is apparent that they have been vested with full control over the shops in dispute. They are under an obligation to pay monthly to the committee a sum of Rs. 700 and it is declared in the deed that the lessees are to be entitled to get any rents they can from the persons to whom they let out the shops. They are given full powers to eject tenants and to make all arrangements which are necessary for the renting out of the property.

The next question that arises is whether the defendant was entitled to raise a plea that he could not be ejected without notice. It is perfectly clear from the pleadings and also from other evidence in the case that the defendant has denied the right of the plaintiffs and he has been maintaining that he is a tenant not of the plaintiffs but of the Islamia Committee. As regards this latter contention, there is no evidence whatever, and it seems to us to be clear on all hands that he has never been, at any time regarding which we have any evidence, a tenant holding directly under the Committee.

It seems to be true that the defendant has been in occupation of some of these shops for a number of years. On the other hand, we have evidence to show that for the last 15 or 20 years at least the Islamia Committee has been in the habit of giving these five years' leases to *thekadars*, and the obvious inference is that the defendant must have been admitted to occupation of these shops under a grant made by the *thekadars*. We cannot for a moment allow the plea that the defendant is

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a tenant holding directly from the Committee.

Then as regards the present plaintiffs whose lease, as we have said, dates from the 1st of April, 1919 it is clear on all hands that the defendant is nothing more than a trespasser. Some stress has been laid in the courts below upon a previous litigation between the defendant and previous *thekadars*. It seems that prior to the date of the lease in favour of the plaintiffs, attempt had been made by the previous *thekadars* to eject the defendant. The case was compromised under some arrangement by which the defendant vacated some of the shops in his possession and came to an understanding with the then *thekadars* that the rent for the remaining shops was not to be enhanced nor was he to be ejected from them before the 31st of March, 1919 that being the date upon which the lease of the previous *thekadars* expired

The fact that this arrangement was made with the previous *thekadars* cannot help the defendant in the present case. The previous lessees were in control of the property only for the period of the lease which had been given to them by the Committee and they could not, either by agreement or otherwise, confer upon the defendant a right to occupy the shops beyond the period of their own *theka*, which, as we have said, came to an end on the 31st of March, 1919. The result, therefore, is that when the lease of the present plaintiffs came into existence, the defendant was in possession under some arrangement made with the earlier lessees—an arrangement which the present plaintiffs are in no way bound to recognize. The defendant cannot, therefore, be heard to say that any tenancy exists which under the law must be put an end to by the giving of a regular notice as required by the Transfer of Property Act. He has, besides, denied the title of the present plaintiffs He is nothing more than a trespasser and he is in no way entitled to notice.

We hold, therefore, that the rights of the case are with the plaintiffs and we allow this appeal accordingly, set aside the decree of the learned District Judge, and restore the decree of the court of first instance.

Appeal decreed.

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May 16

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

JAINARAIN PANDE AND OTHERS (PLAINTIFFS) v. BHAGWAN PANDE AND OTHERS (DEFENDANTS) *

Hindu Law—Joint Hindu family—Sale of family property—Legal necessity—Questions arising when sale is not supported by legal necessity as to the entire consideration

Where the question is whether a sale of joint family property, which is only in part supported by legal necessity, shall be maintained or set aside, the criterion is not whether the bulk of the sale consideration was taken for legal necessity, but whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account. *Girdharee Lall* v. *Kantoo Lall* (1), *Gobind Singh* v. *Baldeo Singh* (2), *Ram Dei Kunwar* v. *Abu Jafar* (3), *the Deputy Commissioner of Kheri* v. *Khanjan Singh* (4) and *Feloram Roy* v. *Bagalanand* (5) referred to.

The facts of this case sufficiently appear from the judgment of the Court.

Munshi *Harnandan Prasad*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. —The plaintiffs in this case seek to set aside a sale deed of a certain fixed rate tenancy, which was executed by Richhpal Pande in favour of the defendants on the 8th of June, 1911. One of the plaintiffs is the brother of Richhpal Pande; the other plaintiffs are his sons. The allegation of the plaintiffs was that they were living jointly with Richhpal Pande, that the said property was their ancestral property and that Richhpal Pande transferred the same without any legal necessity. The sale was made for Rs. 375. The trial court found that Rs. 101 out of the sale consideration represented the amount taken for legal necessity, but the lower appellate court held that the amount taken for legal necessity was Rs. 275-3. The court of first instance had decreed the claim for possession on payment of Rs. 101 to the defendants vendees, but the lower appellate court dismissed the claim in its entirety, observing that Rs. 275-3 represented the bulk of the sale consideration.

The question in such cases, however, is not whether the consideration which was taken for legal necessity formed the bulk of the consideration, but whether the portion which was

* Second Appeal No. 1165 of 1920, from a decree of A. G. P. Pullan, District Judge of Benares, dated the 7th of July, 1920, reversing a decree of Muhammad Owais Karney, Addition. Munsif of Benares, dated the 26th of February, 1920.

(1) (1874) L. R., 1 I. A., 321
(2) (1903) I. L. R., 25 All., 330
(3) (1905) I. L. R., 27 All., 491
(4) (1907) 11 C. W. N., 474
(5) (1910) 14 C. W. N., 895

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not taken for legal necessity was such a small portion as might reasonably be left out of account. In *Girdharee Lall* v. *Kantoo Lall* (1) the sale of a certain ancestral property, effected by a father for the payment of his debts, was upheld, though a small part of the consideration was not accounted for. Their Lordships there observed: "There is no suggestion either that the bond or the decree was obtained *benami* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved. On the contrary, it was proved that the purchase money for the estate was paid into the bankers of the fathers and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue, and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate and to recover possession of it with mesne profits.

The point for determination in each case, therefore, is whether the portion of the consideration, which was not taken for legal necessity, was such a small part as ought not to be taken into account in determining whether the sale should be set aside or upheld. It is not always possible for the manager of a joint Hindu family to sell property exactly for the amount for which the legal necessity might exist. He might be able to raise a loan by a mortgage, but it might not always be possible for him to find a mortgagee willing to take a mortgage of the property for the amount required, unless the security given leaves a sufficient margin to cover the principal and interest that might eventually fall due on the transaction. In many cases the sale of a portion might be out of the question and fail to command either a purchaser or its proper value.

The property here sold was a fixed rate tenancy, measuring 2.48 acres and assessed to a small rent, but probably yielding a considerable profit to the family. The amount required to meet the legal necessity was only Rs. 275-3, and it is not possible to say that Richhpal Pande could not have sold a portion of the property and raised the money that was required

(1) (1874) L. R., 1 I A., 321 at 332.

for the purpose of meeting the family requirements, and thus saved the rest of the property for the family use.

In *Gobind Singh* v. *Baldeo Singh* (1) and *Ram Dei Kunwar* v. *Abu Jafar* (2) sales have been set aside under similar circumstances. In *Nath Ram* v. *Kanhaiya Lal* (3) the same question had arisen, and, following the above decisions, the sale was not upheld as the portion of the consideration for which no legal necessity had been established, was not such a trifling amount as could be left out of account. As there pointed out, it is difficult to decide cases of this nature upon any fixed arithmetical principle, and the circumstances established in each case have to be taken into consideration, with the nature of the property, to determine whether the amount, which represented the money not taken for legal necessity, was such a small or trifling sum as might be left out of account in determining whether the transaction should be upheld or annulled

A reference has also been made to the decision in *The Deputy Commissioner of Kheri* v *Khanjan Singh* (4). In that case the sale was annulled on payment of the amount for which the legal necessity was found to have been established. In *Felaram Roy* v. *Bagalanand* (5), stress was laid on the fact that " it would manifestly be impossible and possibly prejudicial to the interest of the estate, if the widow were held to be bound in every instance to sell property, for payment of a debt due from her husband, for exactly the sum due to the creditor." But that difficulty does not exist here, because a portion of the fixed rate tenancy could at any rate have been sold in order to raise the amount for which the legal necessity existed. In the circumstances the entire sale cannot be upheld

We allow the appeal accordingly, set aside the decree of the lower appellate court and give the plaintiffs appellants a decree for possession of the disputed property on payment of Rs. 275-3 within six months from this date In case of payment, the plaintiffs will get their proportionate costs from the contesting defendants in all the courts If they fail to pay

(1) (1903) I L R, 25 All, 330
(2) (1905) I. L R, 27 All, 494
(3) S A No 382 of 1919, decided on the 30th of May, 1921
(4) (1907) 11 C. W. N., 474.
(5) (1910) 14 C W. N, 695

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the said amount as above directed, the suit shall stand dismissed and the contesting defendants will get their costs from the plaintiffs appellants in all the courts.

Appeal decreed.

Before Mr. Justice Ryves and Mr. Justice Stuart

RAM JAS SINGH (PLAINTIFF) v BABU NANDAN SINGH AND OTHERS (DEFENDANTS) AND MUSAMMAT RAJ KALI (PLAINTIFF) *

Civil and Revenue Courts—Jurisdiction—Procedure—Revenue Court finding that plaint does not disclose a cause of action triable by such court

Where a Court of Revenue finds that on the facts stated in a plaint presented to it no case is disclosed triable by such a court, it should not merely dismiss the suit, but should order the plaint to be returned to the plaintiff for presentation in the proper court.

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Harnandan Prasad*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

RYVES and STUART, JJ. :—This appeal arises out of the following circumstances :—The plaintiff filed his plaint in the Revenue Court, heading it as a suit under section 160 of the Agra Tenancy Act. He then set out in his plaint the allegations on which he asked for relief from the court. The Assistant Collector of the first class before whom the case came on for hearing was of opinion that the suit was not one under section 160 of the Agra Tenancy Act, but was a suit for contribution by one judgment-debtor against others for the excess share which he had paid. He held that he had no jurisdiction to decide this suit and dismissed it. No evidence at all was recorded. The plaintiff appealed to the learned District Judge and the first ground of appeal taken by him was that, even admitting the fact that the suit was not cognizable by the Revenue Court, the Revenue Court ought to have passed an order for the return of the plaint. The learned District Judge held that he could not decide the case as there were no materials on the record on which he could come to a decision. He held that section 197 of the Agra Tenancy Act was not mandatory, and under the circumstances he declined to interfere with the order of the court below and dismissed the appeal. In second appeal the plaintiff presses the third ground taken in his memorandum of appeal, namely that the court should have

* Second Appeal No. 271 of 1921, from a decree of A. G. P. Pullan, District Judge of Benares, dated the 29th of November, 1920 confirming a decree of Saiyid Liaqat Husain, Assistant Collector, First Class of Jaunpur, dated the 7th of September, 1920

returned the plaint for presentation to the proper court. It seems to us that the trial court could certainly have returned the plaint to the plaintiff on finding that it had no jurisdiction to try the suit, but did not do so. In the same way the appellate court, we think, could have done what the trial court could have done, and we think under the circumstances that this was the proper procedure for the court to have adopted. Under the circumstances we allow the appeal and direct the learned District Judge to order the plaint to be returned to the plaintiff for presentation to the proper court. The respondents will get their costs of this appeal.

Appeal allowed.

Before Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

ARJUN SINGH (DEFENDANT) *v.* MUSAMMAT PARBATI (PLAINTIFF) *

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May, 25

Civil Procedure Code (1908), *section* 144(2)—*Suit for damages by a defendant to prior suit—Injury to property by reason of former suit—Costs no adequate compensation.*

A dispute between the widow of a deceased Hindu and a person who alleged that he was the adopted son of the deceased was referred to arbitration. The arbitrator decided, *inter alia*, that half of the debts owed to the deceased should be assigned to the widow and half to the alleged adopted son. The latter took proceedings to set aside the award, in which he was successful in the first court, but on appeal the High Court restored the award. Meanwhile during the period in which the award, owing to the action taken by the alleged adopted son, remained in abeyance, several of the debts became time-barred. The widow then sued to recover special damages on this account.

Held that the damages incurred were of a special nature and could not be compensated by an order for costs alone. The suit was properly brought and was not barred by section 144 of the Code of Civil Procedure. *Quartz Hill Consolidated Gold Mining Co* v. *Eyre* (1) referred to. *Mohini Mohan Misser* v. *Surendra Narayan Singh* (2) not followed.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Narain Prasad Ashthana* and Pandit *Shambhu Nath Chaube*, for the appellant.

Mr. *A. P. Dube*, for the respondent.

STUART and KANHAIYA LAL, JJ.:—The facts of the suit out of which this appeal arises are these. Ganga Prasad Tiwari died in Mainpuri in 1911. He left a widow Musammat Parbati. Arjun Singh claimed to be his adopted son. Musammat Parbati set up that Arjun Singh was not the

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* Second Appeal No. 135 of 1921, from a decree of Shekhar Nath Banerji, District Judge of Mainpuri, dated the 13th of September, 1920, confirming a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 18th of July, 1918.

(1) (1883) L. R., 11 Q. B. D., 674.
(2) (1914) I. L. R., 42 Calc., 650.

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adopted son of Ganga Prasad On the 8th of October, 1911 Musammat Parbati and Arjun Singh executed an agreement in writing by which they undertook to refer their disputes to the arbitration of a certain Dambar Lal. Dambar Lal accepted the arbitration and made an award on the 8th of November, 1911 by which he awarded a moiety of the debts due to the deceased to Arjun Singh and the remaining moiety to Musammat Parbati He awarded Musammat Parbati a life interest in other property. Arjun Singh instituted a suit on the 6th of May, 1912 against Musammat Parbati for a declaration that the award in question was of no effect as against him and that he was the adopted son of Ganga Prasad and the owner of the entire property left by the latter.

The learned Subordinate Judge of Mainpuri decreed the suit in his favour by a judgment of the 31st of March, 1913 and Musammat Parbati appealed to the High Court which, on the 16th of November, 1915 found that the award was a good and binding award and dismissed Arjun Singh's suit.

The present suit has been brought by Musammat Parbati against Arjun Singh for damages sustained by her in consequence of his suit. The lower appellate court has decreed her relief to a certain extent. It has allowed her compensation in respect of the bonds which became time-barred between the 31st of March, 1913 and the 16th of February, 1915 the period during which she was precluded from suing on the bonds owing to the existence against her of the judgment of the Subordinate Judge which was eventually set aside. Arjun Singh appeals to this Court on a prayer that the whole suit of Musammat Parbati should stand dismissed. Musammat Parbati files cross-objections requesting that she should be granted relief more than was allowed her by the lower appellate court.

The first plea taken by Arjun Singh is that no such suit as that brought by Musammat Parbati can lie. In support of this plea his learned counsel relies in the main on a decision of a Bench of the Calcutta High Court in *Mohini Mohan Misser* v. *Surendra Narayan Singh* (1). The facts in that case were that Mohini Misser had sued Surendra Narayan Singh for an injunction restraining the latter from erecting an indigo factory on certain land. A temporary injunction

(1) (1914) I L R, 42 Calc., 550.

was given to the plaintiff, and finally a mandatory injunction was given to him by the trial court. That mandatory injunction was set aside by the District Judge but restored by the High Court of Calcutta. Their Lordships of the Privy Council subsequently decided on appeal that the plaintiff was entitled to no relief and dismissed the suit. The defendant then sued the plaintiff for damages in respect of the loss that he had undergone owing to his inability to carry on the indigo business during the period that he was restrained under the orders of the trial court and the High Court. The Bench decided that no such suit for damages could lie. We regret we are unable to accept the view of the law taken by the learned Judges in deciding that case. Great stress was laid by them upon the observations of BOWEN, L J., in *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (1) We have looked to the decision of the court of appeal in that case for authority, but we do not interpret the authority of that case as it has been interpreted in the Calcutta case to which we have referred. We find it, on the contrary, to support the conclusion that such a suit as this does lie. It was laid down therein that the mere failure of a litigant to establish his claim to a relief in a civil suit does not necessarily—in fact does not usually—give the successful party a cause of action for damages simply by reason of his success. Even if an action has been brought falsely and maliciously and without reasonable or probable cause, it does not follow that the bringing of the action will furnish a cause of action in a subsequent suit to the person who has been used The first step is to prove special damage, and in the absence of the proof of special damage no action for damages will ordinarily lie. The reasons are shortly that the bringing of an ordinary action does not as a natural or necessary conclusion involve any injury to a man's property, and, further, that the only costs which the law recognizes and for which it will compensate him, are the costs properly incurred in the action itself. For this the successful defendant has already been compensated. Therefore, as stated by BOWEN, L J , the bringing of such an action even maliciously and without reasonable or probable cause will not ordinarily support a subsequent action for malicious prosecution. But the case is different where the bringing of an

(1) (1883) L R 11 Q. B D., 674.

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action does as a necessary consequence involve an injury to property which cannot be compensated by the grant of costs in the action, and in that very case, *Quartz Hill Mining Co.* v. *Eyre* (1), it was held that an action did lie for falsely, maliciously and without reasonable or probable cause presenting a petition to wind up a trading company.

What are the facts here? Arjun Singh, after agreeing to have the dispute as to the property with Musammat Parbati decided by the award of a competent arbitrator, resiled after the award had been made, and instituted a suit against Musammat Parbati, in consequence of which she was deprived for a certain period of all right to enforce the payment of certain debts due to her deceased husband, with the result that their payment in certain instances became impossible owing to the action of the law of limitation. Here is a special damage following as a direct consequence of the action of Arjun Singh. Could Musammat Parbati have recovered compensation for this damage by the awarding to her of costs in the previous proceeding? We are satisfied that she could have obtained no compensation in this manner. Could she have obtained that compensation under the provisions of section 144 of the Civil Procedure Code? We are of opinion that she could not have obtained compensation under that section, for the payment of damages in respect of the injury which she had suffered was not properly consequential on the reversal of the Subordinate Judge's decree by the High Court. It has to be noted that the Subordinate Judge's decree was merely for a declaration that a certain award was bad in law and that Arjun Singh was the adopted son of Ganga Prasad. The High Court directed that the suit should stand dismissed on the ground that the award was a good award and that the question as to whether Arjun Singh was or was not the adopted son of Ganga Prasad did not require to be decided. As a result of the dismissal of the suit on appeal and the reversal of the decree, the question of the payment of damages to Parbati owing to her incapacity to bring suits from 31st March, 1913 to 16th of February, 1915 certainly did not arise. So the provisions of section 144 (1) have no application. Section 144 (2) reads as follows:—

"No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

(1) (1914) I. L. R., 42 Calc., 550.

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We understand this sub-section to mean that where restitution cannot be obtained by application under sub-section (1), as is the case here, there is no bar to the institution of a suit. We thus find that the relief which has been awarded to Parbati by the lower appellate court could be legally awarded to her in a suit of the nature which she brought, and we find that on the merits she was entitled to that relief. This concludes the appeal.

With regard to the cross-objections we are of opinion that the lower appellate court has rightly decided the matter and that it has given Musammat Parbati all the relief to which she is entitled and that it is not possible to grant her any more. For the above reasons, we dismiss the appeal and the cross-objections. The appellant will pay his costs of the appeal and those of the respondent. The respondent will pay her own costs of the cross-objections and those of the appellant.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Ryves

EMPEROR *v.* UDAI RAJ SINGH *

1922 *May*, 19.

Criminal Procedure Code, sections 110 and 437—Security to keep the peace—Further inquiry

It is not intended that section 437 of the Code of Criminal Procedure should be used for the purpose of having a review of proceedings under section 110 of the Code merely because the District Magistrate happens to take a different view of the evidence which was before the trying Magistrate from that which the trying Magistrate himself took

THIS was an application in revision from an order directing further inquiry into a case under section 110 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the judgment of the Court.

Hafiz *Mushtaq Ahmad*, for the applicant.

The Assistant Government Advocate (Mr. *R Malcomson*), for the Crown.

RYVES, J.:—In this case proceedings were taken against Udai Raj Singh under section 110 of the Criminal Procedure Code. The matter was inquired into by a Magistrate who heard a large number of witnesses on both sides and in a well considered judgment came to the conclusion

* Criminal Revision No. 191 of 1922, from an order of A. C. Holmes, District Magistrate of Jaunpur, dated the 7th of April, 1922

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that it was not proved that orders under section 110 of the Criminal Procedure Code should issue against Udai Raj Singh. The District Magistrate, without issuing notice, ordered further inquiry under section 437 of the Criminal Procedure Code. On revision this Court set aside that order. Notice was then sent to Udai Raj Singh, and the successor of the then District Magistrate ordered further inquiry. The reasons given really amount to this that if the trying Magistrate had taken a proper view of the evidence, that is to say, the view which the District Magistrate felt inclined to take, then he would have passed orders under section 110 of the Criminal Procedure Code. He now refers the matter back to him for further inquiry as he calls it, but really, it seems to me, with a recommendation or advice that orders under section 110 of the Criminal Procedure Code were indicated. I do not think section 437 was ever intended for a case like this. In my opinion, the trying Magistrate was quite entitled to come to the opinion which he did, and merely because another Court does not agree with that opinion, is no reason to direct the so-called further inquiry. There is no suggestion that further evidence is available or should be taken. Under these circumstances I set aside the order under section 437. If, of course, in future it becomes necessary to take proceedings against Udai Raj Singh, this will be no bar to such proceedings.

APPELLATE CIVIL.

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May, 25

Before Sir Grimwood Mears, Knight, Chief Justice and Mr Justice Bayes

JAGANNATH AND OTHERS (DEFENDANTS) *v.* BALWANT SINGH AND ANOTHER (PLAINTIFFS).*

Act (Local) No II of 1901 (*Agra Tenancy Act*), *sections* 95 *and* 167—*Civil and Revenue Courts—Jurisdiction—Substance of dispute between the parties to be regarded and not only the mere words of the pleadings*

On the death of one L, an occupancy tenant, an application for mutation of names was made by certain persons who alleged that they were his grandsons, being the sons of G, who had been adopted by L, but had died in his life-time Whilst these mutation proceedings were pending, the zamindars filed a suit in a Civil Court They denied the factum and the legality of the adoption of G, and, though admitting that the applicants for mutation were tenants of some kind, alleged that they were merely non-occupancy tenants from year to year The only relief sought was "that it may be declared that Govind was not the adopted son of Lalji and that the defendants are not the grandsons of Lalji"

* Appeal No. 25 of 1921, under section 10 of the Letters Patent.

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Held that the real dispute between the parties was, the relationship of landlord and tenant being admitted to subsist between them, merely as to the nature of the tenancy The matter in issue was one which could be the subject of a suit under section 85 of the Agra Tenency Act, 1901, and was therefore cognizable by a Court of Revenue and not by a Civil Court, and an appeal lay to a Court of Revenue and not to the District Judge or the High Court

Ram Charitra Rai v *Jinsi Ahirin* (1), *Dori Lal* v *Sardar Singh* (2) and *Birham Khushal* v *Sumera* (3) referred to.

THIS was an appeal from a judgment of a single Judge of the Court under section 10 of the Letters Patent. The facts of the case are fully set forth in the judgment of the Bench hearing the appeal

Dr. *S. M. Sulaiman* and Babu *Saila Nath Mukerji*, for the appellants

Munshi *Gulzari Lal*, for the respondents

MEARS, C J. and RYVES, J —The facts out of which this appeal arises are shortly as follows :—Lalji was an occupancy tenant of a holding in the village of Khajuri, of which the plaintiffs respondents are the zamindars

Lalji died recently, and on his death the defendants appellants applied for mutation of their names in the place of Lalji, as being entitled to succeed to his occupancy holding While those proceedings were pending, this suit was brought in the Court of the Munsif for a declaration that the defendants were not the grandsons of Lalji The pleadings will be examined in detail later on One defence to the suit was that it was not cognizable by the Civil Court

The Munsif held that he had jurisdiction, as the prayer was for a declaration only, and on the merits decreed the suit.

The defendants appealed and again objected to the jurisdiction of the Civil Court to entertain the suit. The District Judge upheld this contention, and dismissed the suit. The plaintiffs appealed to this Court, and a learned Judge of this Court allowed the appeal and sent the case back to the District Judge to try the appeal before him on the merits

From that order, the defendants have brought this appeal under the Letters Patent.

After hearing full argument, we think the appeal must be allowed and the suit dismissed on the ground that it was not cognizable by the Civil Court

This appeal raises the question of the conflict of jurisdiction between the Civil and the Revenue Courts in a particularly convenient form.

(1) (1912) I L R, 36 All, 43
(2) 1906) 5 A L J, 514
(3) (1913) I L R, 35 All, 209

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Section 167 of the Agra Tenancy Act provides that all suits . . . of the nature specified in the fourth schedule shall be heard and determined by the Revenue Courts and, except in the way of appeal as provided in the Act, "no Court other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit might be brought."

In *Ram Charitra Rai* v. *Jinsi Ahirin* (1), (to which decision one member of this Court was a party) it was laid down that while it is necessary to guard against formulating any such general rule as that a suit for a declaration of legal status cannot be entertained by a Civil Court merely because such a suit may be brought in consequence of a dispute which originally arose between landlord and tenant, nevertheless an examination of the plaint in the light of the surrounding circumstances may show that the suit in fact offends against the provisions of section 167. It was there pointed out that a plaint might be so drafted in which a mere declaration as to the existence of a valid marriage, or as here, of a valid adoption, might have been sought, in respect of which it could scarcely have been held that the jurisdiction of the Civil Court was ousted.

The *ratio decidendi* of that case was that in all such cases we must determine what was the real contest between the parties and what was the real object of the suit. And for this purpose we must examine the plaint with care. Two similar cases are *Dori Lal* v. *Sardar Singh* (2) and *Birham Khushal* v. *Sumera* (3).

The plaint opens with the statement that Lalji was an occupancy tenant of the plantiffs who are the zamindars of the village. He died "*without leaving any son or other legal heirs*" one and a half months before the suit. Thereupon, the defendants, who are described as the grandsons of Lalji's sister, made an application in the Revenue Courts on the 3rd of January, 1918 for the entry of their names as occupancy tenants in the place of the deceased Lalji. They asserted that Jalji executed a deed of adoption on the 11th of February, 1905 stating that he had adopted Govind as his son and that the defendants are the sons of Govind, who is also dead

The plaint goes on to say that Lalji also made two wills

(1) (1913) I. L. R., 36 All., 48.
(2) 1908) 5 A. L. J., 514.
(3) (1913) I. L. R., 35 All, 299.

in defendants' favour but that both are "legally null and void" and that the defendants have not acquired occupancy rights

With regard to the adoption, it is stated that Lalji was a Gaur Brahman by caste, and thus could not legally adopt his sister's son. Other objections were taken to the adoption, culminating in the assertion that as a matter of fact it never took place. Govind died four years before suit in the lifetime of Lalji.

Then comes a very significant statement which really contains the kernel of the case for the plaintiffs:—Paragraph 7. "The defendants are the grandsons of the sister of Lalji deceased. Their father, Govind, was not adopted by Lalji, and *their possession over the occupancy holding of Lalji is simply that of non-occupancy tenants from year to year.*"

The cause of action is said to have accrued on the 3rd of January, 1918 the date of defendants' application for mutation of names, and in the beginning of February, 1918, when the defendants refused to withdraw that application This act is stated to be "prejudicial to the plaintiffs' rights" and hence the suit

The only relief sought is "that it may be declared that Govind was not the adopted son of Lalji, and that the defendants are not the grandsons of Lalji."

Now the plaintiffs admit that they are the landlords and that the defendants are in possession as their tenants, but only as non-occupancy tenants from year to year, and it seems fairly obvious from the plaint itself that the object of the suit is to get a declaration that will prevent the defendants from establishing their claim to succeed to Lalji's occupancy holding.

When we turn to the written statement, the matter is placed beyond all doubt.

The defendants say, in effect, that Lalji who had no son did adopt Govind, and that by a special custom of the brotherhood, the adoption of a sister's son was valid. That ever since the adoption which took place before 1905 (when the deed of adoption was executed), Lalji brought up Govind, got him married, and that Govind and his sons, the defendants, have all along been sharing in the cultivation of the occupancy holding and living with Lalji. After the death of Govind, Lalji executed the two wills in defendants' favour merely as a precaution, and the plaintiffs have brought this suit :

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deprive them of their occupancy holding. Lastly, it is pleaded that the dispute can only be decided by the Revenue Courts, and the claim for a declaration cannot be maintained, and the suit is not cognizable by the Civil Court.

Taking the pleadings together, it is admitted that the relationship of landlord and tenant subsists between the parties and that the tenancy is still existing. The only dispute is as to the nature of that tenancy. Is it an occupancy tenancy as the defendants claim, or a non-occupancy tenancy from year to year, as the plaintiffs assert?

The answer depends, according to the parties, on whether Lalji's alleged adoption is proved and is valid in law.

We must now turn to see whether any one of the suits specified in the fourth schedule to the Agra Tenancy Act might be brought in respect of the dispute between the parties; because if there is an appropriate suit provided in the Revenue Court, then the cognizance of the Civil Courts is ousted

It seems to us that a suit *by either party* would lie under section 95 (*a*) and (*b*) A suit under this section in included in Group C, item No. 34 in the fourth schedule and, therefore, the object of the present suit is either to forestall a suit under section 95 at the instance of the defendants for a declaration that they are occupancy tenants of the holding, or to strengthen the hands of the plaintiffs in the event of it being necessary for them to bring a similar suit for a declaration that the defendants are non-occupancy tenants, or else to enable the plaintiffs to bring a suit for ejectment under section 58 on the ground that the defendants are non-occupancy tenants. The suit being of this nature, we are of opinion that it is not cognizable by the Civil Court.

It was, however, argued by the learned advocate for the plaintiffs, that the question of jurisdiction was purely academic and that whether the original court had or had not jurisdiction, once the matter went on appeal to the District Judge, he and this Court have jurisdiction to decide it, having regard to the provisions of sections 196 and 197 of the Act. This view seems to have commended itself to the learned Judge of this Court. In his judgment he says :—

"It is clear that no Revenue Court has jurisdiction to pronounce a final decision upon a question of status or adoption. If the decision of the lower appellate court is maintained and the plaintiffs are referred to a suit under section 95 of the Tenancy Act in the Revenue Courts, the question of adoption will necessarily come up for disposal. It is only on the basis of an adoption that the defendants in any circumstances could be held to be entitled to occupancy right in this holding.

I am unable, therefore, to see why in the present case, this suit should not be entertained and disposed of by a Civil Court, which admittedly is the only Court which can come to a final decision upon the question of adoption, and although the purpose of the plaintiffs may be eventually to obtain a decision from the Revenue Court that the defendants are merely tenants-at-will and not occupancy tenants, I fail to see why having asked the Civil Court for a relief which the Civil Court alone is competent to give, the Civil Court should decline jurisdiction."

The learned Judge's decision seems largely to be based on the assumption that the Civil Court alone could decide the question of adoption. In this view we are unable to agree

We have, however, to consider whether sections 196 and 197 can apply. Section 197 only applies, if under section 196 the appeal lies to the District Judge or High Court.

In our opinion the appropriate suit for the plaintiffs to have brought was for a declaration under section 95 of the Tenancy Act. Turning to group C of the fourth schedule, we find such a suit (item No. 34) is triable by an Assistant Collector of the first class, and the appeal lies to the Revenue Court and not to the District Judge or High Court.

Section 197, therefore, has no application.

The result is we allow the appeal, set aside the order of remand made by this Court, and restore that of the District Judge dismissing the suit.

The appellants will be entitled to their costs throughout

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr Justice Ryves

MAZHAR ALI KHAN (DECREE-HOLDER) *v.* MAHFUZ HASAN (JUDGMENT-DEBTOR) *

1922 *May*, 25.

Act No XXIII of 1871 *(Pensions Act), section 7—Attachment of pension—Allegation that pension is attachable under section 7 of the Act—Burden of proof*

If a decree-holder seeks to attach and bring to sale a pension payable to the judgment-debtor, which would usually be exempt under the provisions of Act No XXIII of 1871, it is his duty, if his case is that the pension belongs to that class which is referred to in section 7 of the Act, to set out the facts and prove his case

This was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are fully set forth in the judgment under appeal, which was as follows:—

"This is an appeal in an execution matter raising a short but interesting point of law. The applicant or decree-holder had recovered judgment in a suit for contribution against

* Appeal No. 34 of 1921, under section 10 of the Letters Patent

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several co-mortgagors including the defendant, the present appellant Mahfuz Hasan, No. 12 in the application for execution and No. 15 in the array of defendants in the original suit, and he applied in the execution court for attachment or sale of certain property mentioned in column 10 of the application, in discharge of the liability which had been declared against the defendants in the suit; and included in the details under column 10 was item 3 described in the following words:—'Rs. 125 annual amount of pension under political treaty which is realized from the Treasury of district Moradabad and which was granted under the order of the Board of Revenue, United Provinces of Agra and Oudh, forming part of Rs. 206-8-11' The statement of the figures appears to be incorrect The amount given is an annual amount The pension papers disclose an annual pension of Rs. 26-8-11 or Rs. 13-4-5 half yearly. It may be that, as Mr. *Raza Ali* for the appellant suggests, the warrant before me is only one warrant for payment out of several representing the total pension or it may be that the applicant's description was incorrect I am only dealing in my judgment with the pension warrant before me If any further question arises about any other pension warrants, the Court must be guided by my judgment in this case. An objection was raised by the judgment-debtor that the political pension which the decree-holder wanted to sell was not saleable and not liable to execution. The execution court has held that this objection has no force and that the matter was decided in the original suit and that this decision is binding on the parties.

"I do not agree with this view. I am inclined to think that the question whether a particular piece of property in the hands of the defendant is attachable, is irrelevant in a suit which is brought to determine the liability of that defendant, but looking at the long history of the litigation in the suit, I am quite satisfied that the point was not decided by anybody so as to be binding upon the parties. The history of the matter is this. The plaintiff brought his suit for contribution and succeeded in the first court in May, 1912 and the defendant in that suit contended that he was not liable, and, at any rate, that his political pension could not be made answerable for any part of his liabilities. The trial court framed an issue on this point and decided it in favour of the plaintiff, giving as his reason that the present appellant, namely, the then

defendant, was not the pensioner and that the pension did not come within sections 11 or 12 of the Pensions Act of 1871. An appeal was brought to this Court and decided by the High Court on the 13th of March, 1917 (F. A. No. 350 of 1915) when the appeal was allowed on the ground that the trial court had altogether misunderstood the principles of a suit for contribution and the suit was remanded to the first court for retrial. It was retried and decided in favour of the plaintiff by a judgment of the 31st of May, 1915 by the same Judge who has dealt with this matter in the execution court. An appeal was again brought to this Court which came before my brother PIGGOTT and myself, and we made certain modifications in the decree of the lower court with regard to the amount of the plaintiff's claim and the proportionate liabilities of certain of the defendants, and in that appeal a cross-objection was filed by the present appellant objecting that the arrears or balance of the liability could not be charged upon his pension or pensions. We did not deal with that matter or decide it in any way There is no evidence before me that it was urged upon us and that we held it to be irrelevant or, as is equally possible, it was not urged by counsel on the ground that he could not do so with any hope of success. A point relevant to the liability in suit which has been taken or may have been taken and has been deliberately abandoned cannot be reopened, but that principle does not apply to points which are irrelevant before decree, as I think this was. In my opinion, therefore, the execution court is wrong in saying that there was a binding decision upon the parties on the point. The judgment of the first court at the first trial in 1912 has been reversed and no longer exists and there is no judgment subsequent to the High Court's orders directing a retrial in which this point has been decided or dealt with.

"I, therefore, have to decide whether the objection is a good one or a bad one. At first sight there seemed to be a great deal to be said for the reasons given by the first judge who dealt with the matter in 1912, but now that the payment warrant is before me, it seems to be conclusive on the question of fact whether this is a political pension or not within the meaning of section 11 of Act XXIII of 1871. It is an official document issued by the Treasury Officer under the authority of the Assistant Accountant General to the Collector of Moradabad It is headed 'pension payment order' and

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it is described as the 'pensioner's half,' no doubt because it is issued to the pensioner himself. It gives the name of the pensioner as the present judgment-debtor It gives his age and description and the amount of his pension as 'treaty political pension in perpetuity.' It contains a note under the authority of a Government order that payment under it is to be made only to the 'pensioner' with certain exceptions, and a red ink note in English, Urdu and Hindi that on the decease of the 'pensioner' this order shall be immediately returned by his family to the District Officer. The history of this pension is not before me. It is admitted by the judgment-debtor that he was not the original pensioner. Musammat Kundan is said to have been at one time the pensioner and she was succeeded, it is said, by transfer by one Musammat Alemunnisa, who in her turn was succeeded by the present judgment-debtor Section 12 of Act XXIII of 1871 makes all assignments and sales *inter alia* of all pensions mentioned in section 11 null and void. That can only mean that they are not binding on the grantor, in this case the Government. But it follows from that that the Government can, if they please, continue the pension to any descendant or transferee. It is idle to speculate whether the present transferee may be a lineal descendant or a blood relation or somebody for whom the Government had consideration and was willing to accept as the continuing pensioner. At any rate the fact that it was being paid in 1919 is conclusive evidence that it had not been nullified or avoided by the Government at the time when this decree was passed.

"At the 11th hour the respondent's counsel urged upon me either to refer an issue to the first court or to hold that this was a pension older in date than the Act of 1871 and granted by the Government before that Act, so as to come within section 7, sub-section (2) of the Act which makes such pensions capable of alienation or descent and liable to be sued for and recovered in the same manner as any other property. It does not seem to me that there is anything to try and, therefore, nothing which I can properly refer. The applicant never until this moment suggested that there was any question of fact which it was necessary to inquire into for the purpose of justifying his application for execution, and it would be simply speculation on my part to draw the inference either that it was or was not older that 1871, I find

myself unable to come to any other conclusion than that it is a treaty political pension within the meaning of section 11 of the Act and that the present application is an attempt by a creditor to seize or attach it in respect of a demand against the pensioner. Such a proceeding is prohibited by section 11 of the Act of 1871 and, therefore, the application ought to have been dismissed and the objection allowed. I allow the appeal and declare that this pension to which this document relates was like any other political pension payable to the judgment-debtor and is not attachable in pursuance of the creditor's decree The appeal must be allowed with costs and the application of the decree-holder, so far as it relates to item 3 of column 10 of his application, namely, the political pension, must be dismissed with costs in the lower court."

Pandit *Mohan Lal Sandal*, for the appellant.

The Hon'ble *Syed Raza Ali*, for the respondent.

MEARS, C. J. and RYVES, J.—As we are in agreement with the findings of fact and the propositions of law enunciated by MR. JUSTICE WALSH, we can dismiss this appeal with very few words. The decree-holder wished to attach and sell a pension. It was his duty, if his case was that the pension belonged to that class which are referred to in section 7 of Act XXIII of 1871, to set out the facts and to prove his case. He did not do so. Nobody, even to-day, knows whether the pension was granted prior to the Act of 1871 or subsequent to it. Nevertheless it has been argued here very strenuously that the execution creditor did all that was necessary and that he is entitled to attach and sell the pension. He has not proved any right to attach and sell the pension. There is no reason to infer that it was granted before 1871 nor is there any reason to infer that it was granted after 1871. The matter is entirely open. A pension ordinarily is not attachable for sale. If the decree-holder wanted to bring this within the exception and show that this individual pension happened to be attachable for sale, he should have done so by appropriate proof. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

1922
May, 25.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

NIHAL SINGH AND ANOTHER (DEFENDANTS) v. FATEH CHAND AND ANOTHER (PLAINTIFFS).*

Specific relief—Suit by purchaser deprived of property in consequence of a decree for specific performance, to recover consideration money from successful plaintiffs—Equitable relief—Privity of contract

B agreed to sell certain property to N and D with the object of paying off a decree held against him by S. The terms of the sale were that Rs. 100 was to be paid as earnest money, Rs. 200 in cash, and Rs. 2,600 was to be paid to the decree-holder.

Thereafter B, instead of carrying out this agreement, sold the property in question to S himself for Rs. 3,000, of which Rs 3,034-6 were credited in payment of the decree, satisfaction of which was entered up, and the balance was paid in cash to the vendor.

N and D then sued B and S for specific performance of the agreement to sell to them, and on appeal obtained a decree from the High Court, in pursuance of which a conveyance was executed and S lost possession of the property.

The surviving brothers of S, who had died meanwhile, then sued N and D to recover from them the sum of Rs. 3,034-6, the part of the consideration for the sale to S which had been applied in satisfaction of his decree:

Held that the suit would lie, and the plaintiffs were entitled to recover, but only to the extent of Rs. 2,600, the amount which, under the original agreement between B and the defendants, was declared payable to the decree-holder S.

Debnarayan Dutt v. *Chamilal Ghose* (1) referred to.

The facts of this case are fully set forth in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellants.

Munshi *Girdharilal Agarwala*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ.:—This case has been argued at considerable length before us but we have come to the conclusion that the decree of the lower court ought to stand.

The suit was a suit for the recovery of a sum of Rs. 3,034-6 alleged to be due from the first two defendants, Kunwar Nihal Singh and Kunwar Dwarka Singh. The plaintiffs in the suit were Fateh Chand and Hira Lal, who admittedly are the brothers and survivors of one Sewa Ram.

It is necessary to set out in some detail the earlier history of this case. Sewa Ram had obtained in the year 1908 a simple money decree against a judgment-debtor, named Kunwar Bhawani Singh, who is impleaded in the present suit as defendant No. 3.

* Second Appeal No. 383 of 1921, from a decree of Shekhar Nath Banerji, District Judge of Mainpuri, dated the 14th of December, 1920 confirming a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 2nd of April, 1919.

(1) (1913) I. L. R., 41 Calc., 137.

In execution of that decree Sewa Ram attached certain immovable property on the allegation that it belonged to his judgment-debtor.

This attachment produced an objection on the part of Bhawani Singh's wife, Musammat Durga Kunwar, who put forward the plea that the property had been transferred to her

This objection of Musammat Durga Kunwar was allowed Thereafter Sewa Ram brought a declaratory suit for the purpose of establishing that the property which he had got attached was, in fact, the property of his judgment-debtor. Sewa Ram won this case and, thereafter, began execution proceedings

Meanwhile, on the 19th of February, 1910, Bhawani Singh entered into an agreement with Nihal Singh and Dwarka Singh to sell to them certain zamindari property, his object being to pay off the decree which was outstanding in favour of Sewa Ram.

There can be no question that by this agreement Bhawani Singh undertook to sell the property to Nihal Singh and Dwarka Singh for a sum of Rs 2,900, Rs 100 was given as earnest money, Rs. 200 was paid in cash, and the balance of Rs. 2,600 was left with the purchasers for payment to Sewa Ram in satisfaction of his decree.

This sale, however, was not carried out, and on the 7th of June, 1910 Sewa Ram, the decree-holder, himself got a sale deed from the judgment-debtors, Bhawani Singh and his wife, Durga Kunwar. The consideration of this deed was a sum of Rs. 3,300. Out of this Rs. 3,034-6 were appropriated by Sewa Ram in satisfaction of his decree. Sewa Ram certified satisfaction to the court. The rest of the money was paid to the vendor in cash.

Following on this, in the year 1912, Nihal Singh and Dwarka Singh brought a suit for specific performance of the contract for conveyance which had been executed in their favour on the 19th of February, 1910. They lost this suit in both the courts below, but in second appeal this High Court gave a decree directing that specific performance of the contract to sell should be enforced It was directed by this Court that Sewa Ram, the subsequent purchaser, and Bhawani Singh should join in executing a conveyance in favour of the successful plaintiffs, Nihal Singh and Dwarka Singh, and that conveyance was ultimately executed on behalf of Sewa Ram and

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Bhawani Singh by the learned Subordinate Judge of Mainpuri. The terms embodied in this conveyance were the terms which had been agreed upon by the parties to the contract of the 19th of February, 1910. After this conveyance had been executed by the Court in favour of Nihal Singh and Dwarka Singh, Sewa Ram lost possession of the property, and now we have this present suit brought by the survivors in interest of Sewa Ram to recover from Nihal Singh and Dwarka Singh a sum of Rs. 3,034-6, that being the amount which under the sale-deed executed in favour of Sewa Ram was appropriated in satisfaction of Sewa Ram's decree.

The suit was contested on every imaginable ground. The main plea with which we are concerned was that there was no privity of contract between Nihal Singh and Dwarka Singh on the one side and the plaintiffs or their predecessor on the other. Great reliance was placed upon the fact that Sewa Ram was a stranger to the contract of the 19th of February, 1910 and it was pleaded that being a stranger to that contract, neither he nor his successors were entitled to sue for the purpose of enforcing any covenant entered into between the defendants and their vendor.

The result has been that both the courts below have decreed the claim, though not to the extent to which the plaintiffs desired. Both the courts have held that although the defendants Nos. 1 and 2 are liable to these plaintiffs, they are only liable to the extent of Rs. 2,600, that being the amount which under the contract of the 19th of February, 1910 was left with them for payment to Sewa Ram. Interest on this sum to the amount of Rs. 144-11 has been allowed.

It has been strongly argued before us that the suit was not maintainable inasmuch as Sewa Ram was no party to the contract of the 19th of February, 1910. There can be no doubt that the general law is that a stranger to a contract is not entitled to sue, but there are cases in which the courts have granted relief in favour of a stranger to the contract on principles of equity. We have been referred to a great many cases of various courts but we shall content ourselves with referring to the case of *Debnarayan Dutt* v. *Chunilal Ghose* (1). There the whole law on the subject has been lucidly laid down in the judgment of JENKINS, C. J. We consider that there is a close analogy between the facts of the present case

(1) (1913) I. L. R., 41 Calc., 137.

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and the facts of the case with which the Bench of the Calcutta High Court was dealing in the reported case, and we think, when all the facts are examined, it is not possible to maintain the plea that Sewa Ram or his successors-in-interest, the present plaintiffs, are altogether strangers to the dealings between Bhawani Singh on the one side and Nihal Singh and Dwarka Singh on the other, so as to preclude them from asking for the relief which has been asked for in this case. We start with the fact that Sewa Ram was outside the contract of the 19th of February, 1910; but then we have the fact that Sewa Ram was impleaded as defendant in the suit for specific performance of that contract which was brought by Nihal Singh and Dwarka Singh, and we have the fact that under the decree of this Court Sewa Ram and Bhawani Singh were both directed to convey the property in dispute to Nihal Singh and Dwarka Singh. Further, it is not to be doubted that it was the intention of this Court that this conveyance to be executed both by Sewa Ram and Bhawani Singh was to be executed upon the very terms which were embodied in the contract of the 19th of February, 1910 and one of those terms was that Nihal Singh and Dwarka Singh were to be liable to pay Rs. 2,600 to Sewa Ram in discharge of the debt owing to him from Bhawani Singh under the decree In other words, although Sewa Ram was at the outset a stranger to the dealings between Bhawani Singh and his purchasers, nevertheless by reason of these subsequent proceedings terminating in a decree for specific performance passed by this Court, Sewa Ram was brought into a degree of privity with Nihal Singh and Dwarka Singh which, in our opinion, justifies us in holding that this is a case in which the equitable relief ought to be granted as it was granted in the Calcutta case to which we have referred There the relief was granted on the ground of certain subsequent dealings between the plaintiff and the defendant No. 5, dealings by which the parties were brought into a relation of privity, and it was upon that basis that the Calcutta Court considered that the plaintiff was entitled to equitable relief Similarly in the present case we think there can be no doubt that in equity the plaintiffs are entitled to the sum which was awarded to them by the court below. In our opinion no question arises of *res judicata* or of the application of section 47 of the Code of Civil Procedure The case is to our mind a straightforward case in which the plain-

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tiffs had a cause of action arising out of a decree which was passed by this Court for specific performance and out of the conveyance which followed upon that decree.

The result, therefore, is that we affirm the decision of the court below and dismiss this appeal with costs.

Appeal dismissed.

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal

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June, 1

DALIP SINGH (PLAINTIFF) v. KHURSHED HUSAIN (DEFENDANT) *

Act (Local) No IV of 1912 (Court of Wards Act), sections 37, 45—Property of disqualified proprietor retained after death of owner—Position of successor as to debts incurred by him

Where, on the death of a ward, the possession of the ward's property is still retained by the Court of Wards, the ward's successor is not disqualified from incurring any liability which might affect the property after the debts and liabilities due by the Court of Wards have been discharged

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Nihal Chand Vatsh*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondent

LINDSAY and KANHAIYA LAL, JJ. :—This appeal arises out of a suit brought by the plaintiff (appellant) for the recovery of money due on account of cloth supplied to and money borrowed by the defendant The defence, so far as it is material for the purpose of this appeal, was that the defendant was, at the time of the alleged transactions, a ward of the Court of Wards and, therefore, incompetent to enter into a contract, to make him pecuniarily liable under section 37 of the Court of Wards Act.

The court of first instance decreed the claim; but the lower appellate court set aside the decree. The view taken by the court of first instance was that the defendant was a ward as regards the property which he had inherited from Musammat Ahmadi Begam, but was not a ward as regards the property which he owned in his own right. The lower appellate court, however, held that he was a ward with respect to both the properties.

It appears that Musammat Ahmadi Begam was the owner of certain property, the superintendence of which was taken over by the Court of Wards on the 22nd of August, 1911. She

* Second Appeal No 268 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 22nd of December, 1920, reversing a decree of P. K. Roy, Subordinate Judge of Meerut, dated the 15th of May, 1920.

died in 1913, leaving certain heirs, one of whom was the defendant. The Court of Wards retained the property of Musammat Ahmadi Begam under its superintendence under section 45, because the debts due by the deceased had not been till then discharged. The property was eventually released on the 7th of June, 1918. The debts, now in question, had been incurred by the defendant between the 24th of September, 1916 and the 30th of December, 1916. Section 45 of Act IV of 1912 lays down that—

"When a ward dies before the liquidation is completed of the debts and liabilities with which the property is charged, the Court of Wards may either release such property or may retain it under its superintendence until such debts and liabilities have been discharged."

It further declares that—

"If the Court of Wards retains the superintendence, the person who has succeeded to the property shall not be competent to transfer or create any charge on, or interest in, any part of such property while it remains under the superintendence of the Court of Wards, nor shall any debts or liabilities previously incurred by any person who has so succeeded, be chargeable on such property until the debts and liabilities due by the Court of Wards have been discharged."

It does not disqualify such a successor from incurring any liability which might affect the property after those debts and liabilities have been discharged.

Section 37 has no application because that section is applicable in terms to wards, as defined by section 3. A ward is a *disqualified* proprietor whose person or property or any part of whose property is under the superintendence of the Court of Wards. The disqualification is declared under section 8. The defendant was never so declared. He made no application under section 10. The property inherited by the defendant from Musammat Ahmadi Begam was under the superintendence of the Court of Wards; but only for a specific purpose, namely, for the discharge of the debts and liabilities which were due by Musammat Ahmadi Begam at the time when the estate was taken over under its superintendence by the Court of Wards. After these debts were discharged and the estate was released, any liability incurred by the successors of the lady might be enforceable, except in so far as that liability creates a charge on the property which was under the superintendence of the Court of Wards while such debts and liabilities had remained undischarged.

The view taken by either of the courts below cannot, therefore, be upheld. The defendant was not a ward of the Court, so as to disqualify him from entering into a pecuniary obligation of a kind not forbidden by section 45, that is of the

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nature of a simple money debt or liability, not amounting to a charge on any portion of the property which was under the superintendence of the Court of Wards

In the lower appellate court no other plea was pressed. We allow the appeal accordingly and, setting aside the decree of the lower appellate court, restore that of the court of first instance with costs.

Appeal decreed

Before Mr Justice Stuart and Mr Justice Kanhaiya Lal.

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June, 2.

AMBA PRASAD (PLAINTIFF) v. WAHID-ULLAH AND OTHERS (DEFENDANTS) *

Act No IV of 1882 *(Transfer of Property Act), section* 82—*Mortgage—Integrity of mortgage broken up—Parts of the mortgaged property purchased by prior and subsequent mortgagees—Rights of purchasers inter se.*

Where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part, but where the rights of the mortgagor have vested partly in a prior mortgagee and partly in a subsequent mortgagee, as a result of a suit brought by each of them to enforce his mortgage without impleading the other, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired

THE facts of this case are fully stated in the judgment of the Court.

MR. *B. E. O'Conor*, DR. *Surendra Nath Sen* and Munshi *Narain Prasad Asthana*, for the appellant.

Maulvi *Iybal Ahmad*, for the respondents.

STUART and KANHAIYA LAL, JJ. :—This appeal arises out of a suit brought by the plaintiff (appellant) for the redemption of a two-thirds share of Katra Gulab Singh situated in Kashmiri Bazar, Agra. The Katra originally belonged to Dhumi Singh, who left three sons, Jwala Prasad, Bhawani Shankar and Debi Shankar On the 28th of November, 1877, these three brothers mortgaged two stables and a house situated in Katra Gulab Singh in favour of Sukhdeo Rai. The mortgage was simple. On the 6th of March, 1878, the three brothers mortgaged the said Katra Gulab Singh with other properties with possession in favour of Sheikh Abdullah. On the 30th of May, 1878, two of them, Bhawani Shankar and Jwala Prasad, mortgaged their two-thirds share of Katra Gulab Singh in favour of Durga Prasad

On the 15th of August, 1879, Sukhdeo Rai sued on his

* Second Appeal No. 1143 of 1920, from a decree of T K Johnston, District Judge of Agra, dated the 22nd of July, 1920, reversing a decree of Kaukeshar Nath Rai, Subordinate Judge of Agra, dated the 3rd of August, 1918.

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mortgage of the 28th of November, 1877, without impleading Sheikh Abdullah or Durga Prasad, and obtained a decree for sale, in execution of which the mortgaged property, namely, two stables and a house in Katra Gulab Singh, was sold by auction and purchased by Sheikh Abdullah, the subsequent usufructuary mortgagee. On the 12th of October, 1879, Durga Prasad sued on his mortgage of the 30th of May, 1878, without impleading any of the prior mortgagees and got a decree for sale, in execution of which he brought to sale the two-thirds share of his mortgagors in Katra Gulab Singh and purchased it himself.

The present suit has been filed by the plaintiff (appellant), who is the son of Durga Prasad, for the redemption of the usufructuary mortgage of the 6th of March, 1878, in respect of that two-thirds share. The defendants are the sons of Sheikh Abdullah. One of them disclaimed any interest in the mortgage; the other defendants pleaded that they had spent a considerable amount in the repairs and improvements of the mortgaged property and that a sum of over a lakh and seventy-six thousand was due to them under the mortgage. There were other pleas, too, with which this appeal has no concern.

The court of first instance held that the contesting defendants had spent Rs. 1,000 in repairs, that they were not entitled to claim the cost of any additions or improvements made by them, and that Rs. 8,343-5-4 were due to them on account of a two-thirds share of Katra Gulab Singh purchased by the plaintiff. It decreed the claim accordingly for redemption, subject to the payment of the said amount. On appeal the lower appellate court allowed to the defendants a right to redeem the mortgage of the 30th of May, 1878, on the payment of the amount of the decree obtained on foot of that mortgage by Durga Prasad, within a certain date, and further directed that if such payment was not made, it shall proceed to determine upon payment of what amount the plaintiff should be allowed to redeem the mortgage held by the defendants. In effect it recognized the right of the defendants, who had purchased two stables and a house in Katra Gulab Singh in satisfaction of the mortgage of the 28th of November, 1877, to redeem the subsequent mortgage of the 30th of May, 1878, in preference to the plaintiff who by virtue of his purchase claimed a right to redeem the prior usufructuary mortgage of the 6th of March, 1878.

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No question of preference is, however, really at issue. No right of redemption was claimed by the defendants in their written statement or otherwise asserted in the course of the trial. The rights of the original mortgagors have been split up. The defendants have purchased two stables and a house in Katra Gulab Singh in satisfaction of a prior mortgage and they are entitled to retain the same until some person entitled to redeem comes forward to pay the money due on that mortgage. The plaintiff holds the rights of a puisne mortgagee under the mortgage of the 30th of May, 1878, and has purchased the rights of two of the mortgagors in Katra Gulab Singh in satisfaction of that mortgage. A portion of the rights of the original mortgagors has thus vested in the defendants and another portion in the plaintiff; and the plaintiff cannot be allowed to redeem more than what he has purchased on payment of a proportionate share of the mortgage money, any more than the defendants can be allowed to redeem more than what they have purchased on payment of a corresponding part of the mortgage money

The claim in the present suit is, however, confined to the redemption of the usufructuary mortgage of the 6th of March, 1878, and the plaintiff is clearly entitled to a decree for the redemption of that mortgage, so far as it relates to the two-thirds share of his mortgagors, on payment of such proportionate amount as may be found due on that mortgage, including the cost of any repairs that may have been carried out by the mortgagee, and free from any liability for such improvements as the mortgagee may have made, which were not needed for the protection or preservation of the mortgaged property. The proportionate mortgage money payable on account of such portion of the mortgaged property as has been purchased by the defendants in satisfaction of the prior mortgage, should be determined after excluding the prior mortgage money, computed as laid down in *Matru Lal* v. *Durga Kunwar* (1) from the value of the said property, inclusive of any interest chargeable after decree

The learned counsel for the defendants respondents relies on the decision in *Yadalli Beg* v. *Tukaram* (2), but in that case one of the mortgaged fields had been purchased by a third person before the mortgagee had sued to enforce his mortgage. In the present case the rights of the mortgagors had not passed

(1) (1913) I. L. R., 42 All., 364.
(2) (1920) I. L. R., 48 Calc., 22.

to any third persons on the dates on which the suits on either of the mortgages of Sukhdeo Rai and Durga Prasad were filed. The mortgagors were parties to those suits; and the only effect of not making the prior or subsequent mortgagees parties to them was to leave their rights of sale or redemption unaffected. The father of the plaintiff and that of the defendants subsequently purchased the rights of the mortgagors in certain portions of Katra Gulab Singh in satisfaction of their respective mortgages; and the only manner in which the rights of the parties can now be properly safeguarded is by applying the principle recognized by section 82 of the Transfer of Property Act (IV of 1882) and allowing redemption in respect of such rights as have been acquired by each party subsequent to the above suits. A reference has also been made to the case of *Parasram Singh* v. *Pandoh* (1). In that case one of the parties had sued the mortgagors and obtained a decree for foreclosure without making the subsequent mortgagee a party to the suit, but no rights in the mortgaged property had been acquired by the subsequent mortgagee. Section 60 of the Transfer of Property Act lays down that where a mortgagee has acquired in part the share of the mortgagor, a person interested in the remaining portion of the mortgaged property is entitled to redeem the same on payment of a proportionate part of the mortgage money. As observed in *Dinanath* v. *Lachmi Narain* (2), *Kallan Khan* v. *Mardan Khan* (3) and *Munshi* v. *Daulat* (4), where the integrity of a mortgage is broken, a mortgagor who owns a part of the equity of redemption can redeem his own part; but where the rights of the mortgagors have vested, as in this case, partly in a prior mortgagee and partly in a subsequent mortgagee, after a suit had been brought by each of them to enforce his mortgage, neither the former can be compelled to redeem the whole nor can he compel the latter to give up his interest in the share of the mortgagor which he has acquired.

The question of the costs of repairs and improvements claimed by the mortgagee does not present any difficulty. The parties agree that the cost of the repairs should be charged against the mortgaged property in connection with which such costs have been incurred. The mortgagee has no right to

(1) (1922) I. L. R., 44 All., 462.
(2) (1903) I. L. R., 25 All., 446.
(3) (1905) I. L. R., 28 All., 155.
(4) (1906) I. L. R., 29 All., 262.

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claim any cost of the improvements made by him; but if he has rebuilt any fallen portion in order to retain the income which was derivable from the same, he can legitimately get the cost thereof and charge the same on the property in connection with which such expense was incurred. In other respects the mortgagee can only claim a right to remove the materials of any improvements which may have been made by him, unless the portions so improved are such as can be allotted to him when a partition takes place, without impairing the rights of the plaintiff. But in no event he can claim the cost thereof from the persons who have acquired the rights of the mortgagors therein.

The appeal is, therefore, allowed and the suit remanded to the lower appellate court with a direction to readmit the appeal under its original number and to dispose of it in accordance with the directions above given. The costs here and hitherto will abide the result.

Appeal decreed.

Before Mr Justice Stuart and Mr Justice Sulaiman

1923

June, 2.

KAMMU AND OTHERS (DEFENDANTS) v. MUSAMMAT FAHIMAN AND OTHERS (PLAINTIFFS) *

Civil Procedure Code (1908), *section* 11—*Res judicata*—*First Court not competent to try second suit*

In order that the doctrine of *res judicata* may apply it is necessary that the trial court which passed the earlier decision should have been competent to try the suit subsequently brought

Rajah Ram Bahadoor Singh v. *Mussamut Lachoo Koer* (1) and *Misir Raghobar Dial* v. *Rajah Sheo Baksh Singh* (2) followed

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narain Prasad Ashthana*, for the appellants.

Mr. *Muhammad Yusuf*, for the respondents.

STUART and SULAIMAN, JJ. :—This appeal arises out of a suit for damages brought in the following circumstances :—The plaintiffs, who alleged themselves to be successors in interest of a certain Badlu, claimed title to a house in Agra city. This house had been sold to the predecessors in interest of the defendants in 1884. The plaintiffs contested the validity of the transfer. A previous suit had been brought by the plaintiffs against the defendants to obtain an injunction to

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* Second Appeal No 664 of 1921, from a decree of T. K. Johnston, District Judge of Agra, dated the 4th of February, 1921, reversing a decree of Govind Sarup Mathur, Officiating Subordinate Judge of Agra, dated the 19th of November, 1919

(1) (1884) L. R., 12 I. A., 23.

(2) (1882) L. R., 9 I. A., 197.

restrain them from pulling down his house. This suit was brought in the court of the Munsif of Agra. An appeal was filed in the court of the District Judge who, by his appellate decree, found in favour of the plaintiffs' title. The suit out of which this present appeal arises was filed subsequently by the plaintiffs on the allegation that the defendants had nevertheless pulled down the house. They therefore claimed for damages against them. This suit was filed in the court of the Subordinate Judge, Agra, the valuation being beyond the jurisdiction of a Munsif. The defendants asserted title to the house as against the plaintiffs. The plaintiffs objected that the question was one of *res judicata* decided in their favour. The Subordinate Judge repelled this plea. In appeal the District Judge has allowed it. The defendants in second appeal question the correctness of the view taken by the District Judge.

The sole point for decision is whether the previous finding that title lay with the plaintiffs is a finding arrived at on an issue in which the matter has been directly and substantially in issue in a former suit between the same parties, litigating under the same title, in a court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally decided by such court. There is no doubt as to the fact that this issue was directly and substantially in issue in a former suit between the same parties, litigating under the same title, and that it was heard and finally decided. The only question is, can the Munsif's court be held to be a court competent to try the suit in which such issue has been subsequently raised? It is clear that it is not. The view which appealed to the learned District Judge was, however, that inasmuch as the District Judge on appeal was responsible for the decision, the decision must be taken to be the decision of the District Judge, and as the District Judge was a court of appeal in the subsequent suit, no question of *res judicata* could arise. He quoted in favour of his view the decision of the Full Bench in *Balkishan* v. *Kishan Lal* (1). But we cannot find anything in that decision which supports his view. The matter in our opinion is concluded by the authority of their Lordships of the Privy Council in *Rajah Run Bahadoor Singh* v. *Mussumut Lachoo Koer* (2). There a

(1) (1888) I. L. R., 11 All., 148
(2) (1884) L. R., 12 I. A., 23.

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plaintiff had brought a suit in the court of a Munsif in which a question of title was raised. The question of title was decided against him and, on appeal to a Subordinate Judge, the decision was affirmed. Their Lordships held that the finding did not operate as *res judicata* when the same question was raised in the court of the Subordinate Judge in his original jurisdiction. From that it can only, in our opinion, be inferred that the competent court to which reference is made in section 11 of the Code of Civil Procedure is the trial court and that it does not affect the question whether the decision is a decision of an appellate court or whichever the appellate court may be. This view is supported by the decision of their Lordships of the Privy Council in *Misir Raghobar Dial* v. *Rajah Sheo Baksh Singh* (1) and by the view which was adopted by the Calcutta High Court in *Bharasi Lal Chowdhry* v. *Sarat Chunder Dass* (2) and *Shibo Raut* v. *Baban Raut* (3) and by the Bombay High Court in *Malubhai Ladhabhai* v. *Sursangji Jalamsangji* (4). We decide therefore that the question is not barred by *res judicata*. This was the only point before us. As the lower appellate court allowed the appeal on a preliminary point and the remaining points have not been decided, we set aside the District Judge's decree and send back the appeal to his successor to be reinstated under its original number and determined on its merits according to law. Costs here and hitherto will abide the result.

Before Mr. Justice Stuart and Mr Justice Sulaiman

1922
June, 2.

ROSHAN LAL AND OTHERS (PLAINTIFFS) *v* LALLU AND OTHERS (DEFENDANTS) *

Execution of decree—Attachment—Mortgage—Execution of mortgage pending attachment under a simple money decree—Civil Procedure Code, section 64; order XXI, rule 66.

During the pendency of an attachment in execution of a simple money decree the judgment-debtors executed a mortgage of the attached property. The property was put up to sale and was purchased by the decree-holders. At the time of sale the mortgage was notified under order XXI, rule 66, of the Code of Civil Procedure. The mortgagees then brought a suit to enforce their mortgage against the decree-holders auction-purchasers.

Held that the notification of the mortgage at the time of sale did not prevent the auction-purchasers from disputing its validity, and that in view

* Second Appeal No. 686 of 1921, from a decree of I. B Mundle, District Judge of Cawnpore, dated the 29th of January, 1921, reversing a decree of Ganga Prasad Varma, Subordinate Judge of Cawnpore, dated the 30th of July, 1919.

(1) (1882) L. R., 9 I. A., 197.
(2) (1895) I. L. R., 23 Calc., 415.
(3) (1908) I. L. R., 35 Calc., 353
(4) (1905) I. L. R., 30 Bom., 220.

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of section 64 of the Code of Civil Procedure the mortgage was of no effect as against them *Dinobundhu Shaw Chowdhry* v *Jogmaya Dasi* (1) and *Abdul Rashid* v *Goppo Lal* (2) distinguished

THE facts of this case are fully stated in the judgment of the Court.

Dr *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

STUART and SULAIMAN, JJ. :—This is a plaintiffs' appeal arising out of a suit for foreclosure on the basis of a mortgage-deed, dated the 30th of August, 1907 It appears that the defendant held a simple money decree, in suit No. 192 of 1898, which was in execution. On the 30th of July, 1907, the property in dispute in this case was attached in execution of the simple money decree; while this attachment was subsisting, the judgment-debtor, on the 30th of August, 1907, executed the mortgage-deed which is the subject-matter of dispute in this appeal. On the 20th of August, 1908, the subsequent mortgagee seems to have made an application to the execution court, praying that his mortgage should be notified. An order of the 14th of November, 1908, passed by the execution court, shows that inasmuch as no objection was preferred, notification was ordered. The property was put up for sale on two occasions, but those sales were set aside. On the 20th of August, 1909, the property was again put up for sale and was ultimately sold to the attaching decree-holder himself for a sum of Rs. 1,800. The subsequent mortgagee has now brought a suit to enforce the mortgage of the 30th of August, 1907, and, on behalf of the defendants, it was contended that inasmuch as this mortgage-deed had been executed at a time when the attachment under the decree in suit No. 192 of 1898 was in force, the mortgage was invalid and unenforceable as against the defendants.

The court of first instance held that the attaching decree-holder had in no way been prejudiced by the execution of this mortgage-deed and that the attachment was no bar to the validity of this mortgage.

On appeal the learned District Judge was of opinion that the plaintiffs were not entitled to enforce their mortgage as against the defendants who have purchased this property in execution of a decree under which the property was under attachment at the time when the mortgage-deed was executed.

(1) (1901) I L R, 29 Calc, 154
(2) (1898) I L R, 20 All, 421.

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The plaintiffs have come up to this Court in second appeal, and, on their behalf, it is argued that the finding of the learned District Judge is not correct. It is contended on their behalf that inasmuch as the defendants had full notice of the existence of the plaintiffs' mortgage, they are estopped now from saying that that mortgage is not valid. In the first place, there is nothing on the record to show that any notice was actually issued to the decree-holder on the application of the 20th of August, 1908. In order to succeed on a plea of estoppel, it was obviously incumbent on the plaintiffs to prove this. In the second place, the proceeding relating to the notification of the mortgage-deed was merely a proceeding under order XXI, rule 66 of the Code of Civil Procedure, and the order passed in that proceeding can in no way be conclusive as to the validity of the mortgage which was going to be announced.

It is next contended that under section 64 of the Code of Civil Procedure the mortgage is not absolutely void, but that it is valid so long as the attaching decree-holder was not prejudiced. It is true that under the new Act this section has been slightly altered. In the old section 276, the words "during the continuance of the attachment" were too wide and might have made all transfers "during the pendency of the attachment" absolutely void. Under the new Code, however, that expression has been substituted by the expression "contrary to such attachment." It is clear, therefore, that a transfer during the pendency of the attachment would be void only as against all claims enforceable under the attachment. It cannot be disputed that it was open to the attaching decree-holder to ignore the subsequent mortgage and to proceed to sell the whole property and not only the equity of redemption, and that if he did so, the auction-purchaser would get the whole property free from the incumbrance, the mortgage not creating any lien on the property sold. There is nothing to show that the property sold was anything less than the absolute interest in it, and there is nothing to show that it was only the equity of redemption, subject to the subsequent mortgage, which was put up for sale and purchased by the defendants.

The learned advocate for the appellants has strongly relied on the case of *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (1). In that case there were, first of all, two previous mortgage-deeds and the equity of redemption was attached in

(1) (1901) I. L. R., 29 Calc., 154

execution of a money decree. While the property was in the course of being sold, a third mortgage was created by the mortgagor in lieu of the amount due under the previous mortgages. The auction-purchaser, in execution of the mortgage-decree, claimed that the provisions of section 276 of the Code rendered the subsequent mortgage wholly void as against him. Their Lordships of the Privy Council, however, held that inasmuch as the intention of the parties was to keep alive the earlier mortgages, it was impossible to hold that the effect of that section was to give an execution creditor an unincumbered fee simple, instead of an equity of redemption, against the intention of the parties. In our opinion that case is clearly distinguishable from the present case. The case of *Abdul Rashid* v. *Gappo Lal* (1) is also clearly distinguishable because in that case the subsequent mortgage was held to be valid only in respect of that excess share which was not legally saleable in execution of a prior decree. The case of *Lala Bhagwan Das* v. *Ahmad Jan* (2) was a case where ultimately the subsequent mortgage was not upheld. But it was clearly pointed out in that case that under order 21, rule 66 of the Civil Procedure Code, if a mortgage-deed is notified, that notification is in no way conclusive, as between the decree-holder or the purchaser on the one hand and the holder of the incumbrance on the other, as to its validity, and it was pointed out that where a sale is not effected subject to a mortgage, but the mortgage is simply notified at the time of the sale, the auction-purchaser is not estopped from questioning the validity of the mortgage.

It is next contended that the mortgage-deed in dispute was executed in order to pay off the money due to another attaching creditor, namely, Sheo Mukh Rai, and that, therefore, this mortgage was valid. In the first place, this point was not taken before the learned District Judge, and we have no pronouncement of his opinion on this point. In the second place, Sheo Mukh Rai did not hold any decree for sale. He was a simple-money decree-holder, and as soon as his amount was paid out of court, the attachment ceased to exist, and we are of opinion that that fact cannot in any way help the appellants. In our opinion the view taken by the learned District Judge on this point was correct. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(1) (1898) I. L. R., 20 All., 421
(2) (1915) 36 Indian Cases, 732

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June, 5

Before Mr Justice Stuart and Mr Justice Sulaiman

BASDEO, RAM SARUP (DEFENDANT) v. DILSUKH RAI, SEWAK RAM (PLAINTIFF) *

Act No. IX of 1872 (Indian Contract Act), section 63—Accord and satisfaction—Cheque for smaller amount than sum due sent as payment in full and cashed by creditor—Creditor not bound to accept it, if at all, as payment in full

Where the debtors, knowing that the creditors claimed a certain amount, sent them a cheque for a smaller sum, with a condition that it was to be taken as in full satisfaction of the claim, and the creditors cashed it and then wrote intimating that they did not agree to the condition, it was *held* that the acceptance of the cheque by the creditors was not a conclusive proof of acceptance of the condition and did not preclude them from suing for the balance of their claim *Miller v Davies* (1) referred to

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Narayan Prasad Ashkhana*, for the appellants

Munshi *Girdhari Lal Agarwala*, for the respondents.

STUART and SULAIMAN, JJ :—Second Appeal No. 862 and Second Appeal No. 960 of 1921 are connected appeals arising out of the same suit. The plaintiffs' firm brought a suit to recover a sum of Rs 1,265-13-0 with interest, on the following allegations Their case, devoid of all unnecessary details, was that the plaintiffs, as agents of the Standard Oil Company, sold 900 tins of kerosine oil to the defendants, the price of which was Rs. 3,982-13-0, that the defendants paid only a sum of Rs. 2,717, and that the balance of Rs.1,265-13-0 was still due. The plaintiffs claim to recover this amount with interest.

On behalf of the defendants it was contended that the sum of Rs 2,717 had been paid in full payment of the plaintiffs' claim and that, having accepted that amount, the plaintiffs are no longer entitled to claim any balance. It was further pleaded that a sum of Rs 500 had been paid by the defendants as advance money for the oil contract and should be deducted.

The court of first instance decreed the plaintiffs' claim for the recovery of Rs. 1,265-13-0 and disallowed the defendants' objection as to the payment of Rs. 500. There were two appeals filed before the learned District Judge, who has affirmed the decree of the court of first instance. The defendants have come up here in second appeal, and, on their behalf, it is contended that it is not now open to the plaintiffs to

* Second Appeal No 862 of 1921, from a decree of T K. Johnston, District Judge of Agra, dated the 13th of April, 1921, confirming a decree of Kaulesbar Nath Rai, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Agra, dated the 31st of May, 1920

(1) Not reported, referred to in (1880) 22 Q B D, 610

ignore the conditions under which the amount of Rs. 2,717 was paid under a cheque and to claim the balance.

It appears that the defendants sent a cheque for Rs. 2,717 with a condition that this sum was being paid in full discharge of the total amount due to the plaintiffs. The plaintiffs retained this cheque and ultimately cashed it, and two days after this they sent a letter to the defendants intimating that they had cashed the cheque, but that they did not agree to receive the amount in full discharge of the payment of the sum due to them The learned advocate for the defendants contends that this is really a case of accord and satisfaction and he relies strongly on section 63 of the Indian Contract Act which embodies that principle. Now, if the plaintiffs had really agreed to accept a smaller sum in full payment of the amount due to them, then there can be no doubt that it would no longer be open to them to go behind that admission and claim the recovery of the balance. On the other hand, if they did not agree to accept that amount in full discharge of the payment of the amount due to them, section 63 of the Indian Contract Act would have no application, for that section would only apply where a promisee agrees to remit wholly or in part the performance of the promise made to him or accepts, instead of it, any satisfaction which he thinks fit. The main question, therefore, was whether the plaintiffs did, in fact, agree to accept the money sent in full satisfaction of their claim. The finding of the learned District Judge on this point is against the appellants and *primâ facie* that finding is a finding of fact which cannot be interfered with in second appeal.

The learned advocate for the defendants (appellants), however, contends that the plaintiffs took time in retaining the cheque which was sent under an express condition that the money was being paid in full discharge of the amount due to the plaintiffs, and that this was a conclusive proof of their having agreed to accept that offer; and it is strongly contended that the sending of the money by the defendants must be deemed to be a conditional offer made by them and the retaining of the cheque by the plaintiffs was an acceptance of that offer, and it is, therefore, urged that the plaintiffs having accepted the defendants' offer to pay the sum of Rs 2,717 in full discharge of the amount due, are not entitled to go behind it. This contention, if well founded, would convert the question into one of law. We are, however, of opinion that the

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mere fact that the plaintiffs retained the cheque and cashed it and at the same time refused to receive the amount in full discharge of the payment of their debt does not raise any conclusive presumption that they had accepted it as a conditional offer made by the defendants. Every case is to be judged on its special circumstances, and in this particular case the lower appellate court has come to a finding that the plaintiffs did not really agree to accept the amount in full discharge of their debt. This is really a question of fact.

On behalf of the defendants reliance is placed on the analogy of section 83 of the Transfer of Property Act, and it is contended that inasmuch as the sum was paid in full discharge of the amount due, the principle underlying that section applies. Reference was also made to the case of *Ram Chandra Marwari* v. *Keshobati Kumari* (1). But the perusal of that judgment would make it clear that that case proceeded entirely on the provisions of section 83 of the Transfer of Property Act which distinctly provides that the money so deposited would have to be accepted in full discharge of the amount due. Their Lordships of the Privy Council, in the case referred to above, lay stress on the fact that the mortgagee was bound to comply with the requirements of the statute under which the money was paid into court and that there was no jurisdiction in the court to permit the money deposited to be drawn out of court on any terms other than those imposed by the statute. That case is clearly distinguishable from the present case. The rule of English law undoubtedly seems to be in favour of the respondents' contention and lays down that if the sum of money sent by a debtor to a creditor is less than the amount actually due, the creditor is not bound to refuse it and may accept the debtor's offer without prejudice to his claim such as it may be. The case of *Miller* v. *Davies* which is an unreported case but is referred to in the judgment in the case of *Day* v. *McLea* (2), is a case which is very much similar to the case before us. In that case a solicitor was entitled to a sum of £50 as costs. The defendant, however, sent a cheque for £25 with a letter stating that in order to put an end to the matter he sent the cheque for £25 on the terms that the plaintiff would receive it in full settlement. The plaintiff kept the cheque and cashed it, but wrote to the defen-

(1) (1909) I. L. R., 36 Calc., 840
(2) (1889) 22 Q. B. D., 610

dant that he declined to accept it in full satisfaction of the payment of the amount due and that he required a cheque for the balance. The plaintiff then brought a suit to recover the balance and the defendant pleaded that there was an accord and satisfaction of the claim, but it was held that it was a question of fact on what terms the cheque was kept. The verdict of the jury was that there was no accord and satisfaction, and that was held to be final in the matter. The same principle was accepted in the reported case of *Day* v. *McLea* (1), which also was a similar one. In that the plaintiffs were claiming damages, and the defendants sent a cheque to them for a sum less than the amount claimed, which cheque the plaintiffs retained. Nevertheless it was held that this did not amount to full accord and satisfaction of the claim. It was further remarked that—

SEWAK RAM

> "If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim and if the money is kept, it is a question of fact as to the terms upon which it is so kept Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim and to cause him to act upon that view In either case it is a question of fact."

Both on authority and principle, therefore, it is clear to our minds that the mere fact that the plaintiffs retained the cheque and cashed it cannot be a conclusive proof in law that they had agreed to accept the amount on the condition offered by the defendants. The question was primarily one of fact and the view taken by the District Judge is binding on us. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal

PUTTU LAL AND OTHERS (DEFENDANTS) v. DAYA NAND (PLAINTIFF) * 1922 *June*, 5.

Civil Procedure Code (1908), *section* 92—*Suit between rival claimants to the office of trustee—Trustee nominated in trust-deed—Subsequent deed nominating different person.*

Section 92 of the Code of Civil Procedure does not apply to a suit between persons who individually claim a right to succeed to the office of trustee

Where the founder of a trust had, by the trust-deed, appointed himself a trustee for life and nominated the plaintiff as his successor in that office, but by a subsequent document he appointed the defendants as trustees after him, it was *held* that as he had reserved no power to himself by the

* Second Appeal No 334 of 1921, from a decree of E Bennet, District Judge of Farrukhabad, dated the 3rd of February, 1921, confirming a decree of Sayid Hakhai Husain, Officiating Subordinate Judge of Farrukhabad, dated the 21st of August, 1920

(1) (1889) 22 Q B D, 610

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earlier deed to alter the scheme of management there laid down, the subsequent appointment of the defendants was not valid.

Bodree Das Mahun v. *Gheeni Lal Johurry* (1). *Muhammad Abdul Majid Khan* v. *Akmad Said Khan* (2) and *Siddhan Lal* v. *Gauri Shankar* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *M. L. Agarwala*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. :—This appeal arises out of a suit brought by the plaintiff (respondent) for a declaration that the plaintiff was entitled to act as the *sarbarahkar* of a certain temple and of the property appertaining thereto and for possession of the said property. The allegation of the plaintiff was that he had been appointed *sarbarahkar* of the said property and temple by Ganga Prasad, the founder of the trust, by a deed executed by him and registered on the 27th of February, 1901. By virtue of that deed Ganga Prasad had dedicated certain property for the benefit of the temple which he had constructed in his life-time, and appointed himself a trustee for his life and nominated the plaintiff as his successor in that office. By a subsequent document, executed by him on the 22nd of May, 1919, he appointed his nephews as trustees after him. These nephews are the defendants to the present suit. They succeeded in getting mutation of names effected, on the death of Ganga Prasad, in the revenue papers. The plaintiff contended that the defendants had obtained the deed from Ganga Prasad under undue influence, but they failed to prove that allegation. The courts below, however, decreed the claim of the plaintiff on the ground that, by virtue of the deed of *waqf* of the 27th of February, 1901, Ganga Prasad had appointed the plaintiff as his successor in the office of trustee and that he had no power thereafter to appoint another man in his place. The view taken by the courts below is supported by the decision in *Siddhan Lal* v. *Gauri Shankar* (3). Ordinarily the founder of a trust is entitled to provide for the management of the trust and to reserve to himself and his heirs the power to appoint trustees; but if he exercises that power and appoints a trustee, the trustee cannot be removed except in the manner laid down in section 92 of the Code of Civil Procedure.

The defendants entered into possession of the trust property under the subsequent deed executed by Ganga Prasad,

(1) (1906) I. L. R., 33 Calc., 789
(2) (1913) I. L. R., 35 All., 459.
(3) (1917) 40 Indian Cases, 165.

by virtue of which they were appointed trustees in the place of the plaintiff. But Ganga Prasad had reserved no power to himself by the earlier deed to alter the scheme of management there laid down, and the subsequent appointment of other persons cannot, therefore, be upheld.

It is urged, on behalf of the defendants, that the suit ought to have been brought under section 92 of the Code of Civil Procedure, but that section provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme by which the object of the trust can be properly carried out. The removal of the trustees can be claimed on the ground of an alleged breach of trust, but no such ground is alleged here in regard to the defendants. All that is stated is that Ganga Prasad had committed a breach of trust by appointing new trustees in the place of the plaintiff. It is not stated that the defendants had committed any breach of trust On the other hand the suit is, as the courts below point out, between rival claimants to the office of trustee. The plaintiff claims that office in his own right by virtue of the earlier deed executed by Ganga Prasad. The defendants claim the same office by virtue of a later deed, which, so far as it is inconsistent with the earlier one, is not enforceable. As pointed out by WOODROFFE, J , in the case of *Budree Das Mukim v. Chooni Lal Joharry* (1), in order to bring a case within the purview of section 539 of the Code of Civil Procedure the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust, upon a cause of action alleging a breach of trust or necessity for directions as to its administration, against a trustee of such express or constructive trust Such trustee may be a trustee *de jure* or a trustee *de son tort*. But if the suit is between persons who individually claim a right to succeed to the office of trustee, section 92 of the Code of Civil Procedure has no application. The right here set up is a personal right to act in a particular office In *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* (2), it was held in somewhat similar circumstances that a suit by a person claiming to be a *mutwalli* of certain property, against another who had taken

(1) (1906) I L R , 33 Calc , 789.

(2) (1913) I L R , 35 All , 459.

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possession of the same, did not fall within the purview of section 92.

We see no reason, therefore, to interfere with the decree passed by the courts below and dismiss the appeal with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr Justice Gokul Prasad.

RAM DAS AND ANOTHER (PLAINTIFFS) v. DUBRI KOERI (DEFENDANT) *

1922 *June*, 5

Jurisdiction—Civil and Revenue Courts—Res judicata—Suit for ejectment as sub-tenant—Decision by Revenue Court that defendant was a tenant-in-chief—Subsequent suit in Civil Court to get round this decision

Where a Court of Revenue has decided a question as to the status of a tenant, neither party to the proceedings in such court can reopen the question by means of a suit in a Civil Court *Bulji* v *Mahipat* (1) followed

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case sufficiently appear from the judgment under appeal, which was as follows :—

"The facts of the suit out of which this appeal has arisen are as follows —Ram Das and Raja Ram claimed to be tenants-in-chief of a certain agricultural holding They asserted that Tilak and others were their sub-tenants and sued to eject them through the Rent Courts The case went as far as the Commissioner of Benares. The Commissioner decided that Dubri paid the rent of the fields to the zamindar and that there was no evidence that the plaintiffs (appellants) paid rent to the zamindar or collected rent from Dubri or the other defendants He therefore dismissed the suit for ejectment Ram Das and Raja Ram then instituted a suit in the court of the Munsif against Dubri for his ejectment. They again pleaded that they were tenants-in chief of the same plots They were in some difficulty as to how Dubri was to be described In their plaint they described him as a trespasser who posed as a sub-tenant. The lower courts have decreed the claim for Dubri's ejectment The first point for decision in the second appeal that Dubri has filed is whether the Civil Court has any jurisdiction in such a matter The point is not an easy one, but I think that it is now concluded in this Court by authority In *Kishore Singh* v *Bahadur Singh* (2) a Bench of this Court decided that where a Revenue Court in a suit for ejectment found that B was A's sub-tenant, and accordingly decreed B's ejectment, a subsequent suit in a Civil Court was not maintainable This decision is only important as showing the trend of judicial opinion in this Court A more important decision is that in *Bulji* v *Mahipat* (1). There the plaintiffs sued the defendants in the Revenue Court to eject them from a holding on the ground that the latter were sub-tenants The defendants pleaded that they were joint tenants. The Revenue Court dismissed the suit holding that they were joint tenants A Bench of this Court decided that a Civil Court had no jurisdiction to decide the case. The learned counsel for the respondents has pointed out that another Bench decided, in *Mukh Ram* v *Chhajju* (3), that when in a suit brought in a Revenue Court the plaintiff failed to obtain the defendant's ejectment as a tenant, a subsequent suit in the Civil Court to obtain his ejectment as a trespasser was not barred by *res judicata* It does not appear to have been discussed in that case whether the Civil Court had or had not any jurisdiction and the point may well have been left open, for the

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* Appeal No 45 of 1921, under section 10 of the Letters Patent

(1) (1918) I. L. R., 41 All., 203
(2) (1918) I. L. R., 41 All., 97.
(3) (1919) 17 A. L. J., 646.

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Bench disposed of the appeal on the preliminary point that the suit was not barred by *res judicata*, and upheld the order of the lower appellate court remanding it for decision on its merits, but in view of the past conflict of opinion I might have been disposed not to take the responsibility of deciding the point myself as a single Judge, were it not that in a recent decision of a Full Bench in *Mallo* v. *Ram Lal* (1) it was practically decided that where a Rent Court had come to a finding as to the nature of a tenancy and a description of the tenant, a Civil Court could not go behind that finding. Perhaps the most illuminating passage upon the point in all these decisions will be found in what PIGGOTT, J., says in *Baljit* v. *Mahipat*. The view I have taken of the present case is as follows:—Here the Rent Court decided clearly and definitely that Dubri was a tenant of the zamindar. It is true the zamindar was not a party to the suit, but as against a rival claimant to the tenancy it was decided that Dubri was tenant, that he paid rent to the zamindar, that the relationship of landlord and tenant existed between him and the zamindar and that the other side had no rights in the matter. The defeated side has come to the Civil Courts, and has asked them, almost in so many words, to set aside the decision of the Rent Court. If the Rent Court had gone outside its province in the decision, if it had no jurisdiction, if it had been expressing an opinion on points on which it could not finally adjudicate, the loser might go to a Civil Court and it would be open to the Civil Court to ignore the Rent Court's decision, but in this particular case the present plaintiffs had themselves invited the Rent Court to decide whether they were the tenants of the holding or whether the other side were the tenants of the holding. The Rent Court had to decide not only that the plaintiffs were not tenants of the holding but that Dubri was a tenant of the holding. It was their duty to decide these points and they could not do other than what they did. It appears to me not open to doubt that such being the case, the losing party, after having exhausted their remedy by way of appeal in the Rent Court, cannot come up to the Civil Court and raise the same question all over again and that they have been precluded from doing so under section 167, Local Act II of 1901. Section 167 lays down that no court other than a Rent Court shall take cognizance of any dispute or matter in respect of which any such suit or application of the nature specified in the fourth schedule might be brought or made. The section does not lay down that a Civil Court may take cognizance of any cause of action other than a cause of action which would entitle a person to bring a suit in the Rent Court. It says "any dispute or matter." What was the dispute or matter in this case? It clearly was whether Ram Das and Raja Ram were the tenants of the holding from the zamindar or Dubri was the tenant of the holding from the zamindar. That was the actual dispute between the parties. This dispute Ram Das and Raja Ram are now attempting to revive in another form. They are making a distinction without a difference and are trying to bring identically the same matter up again. It is not certainly a question of *res judicata*. It might be possible to show that there was no bar by *res judicata*, but it is clearly an attempt to evade the provisions of a special Act. For the above reasons I decree the appeal and direct that the suit be dismissed. The plaintiffs respondents will pay their own costs and those of the appellant in all courts."

Mr. *A. Sanyal*, for the appellants.

Dr. *M. L. Agarwala*, for the respondent.

MEARS, C. J. and GOKUL PRASAD, J.:—The plaintiff brought a suit in the Revenue Court to eject the defendant as his sub-tenant. The suit was fought out up to the court of the Commissioner and it was held that the defendant was not a sub-tenant, but a tenant-in-chief paying rent to the zamindar.

After failing in the Revenue Court, the plaintiff instituted the present suit in the Civil Court for setting aside the decree

(1) (1920) I. L. R., 43 All., 191

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of the Revenue Court above-mentioned and for the possession of the land in dispute.

The defendant's contention was that he was the chief tenant and that such a suit did not lie and was barred by the rule of *res judicata*.

The Munsif decreed the suit, holding that the Revenue Courts were not competent to decide the question that the defendant was the chief tenant and not a sub-tenant of the plaintiff, and the present suit, being between rival tenants, was one cognizable by the Civil Court. This decision was affirmed on appeal.

The defendant appealed to this Court and a learned Judge of this Court has allowed his appeal and dismissed the plaintiff's claim. No doubt it was the tendency of the Court in earlier cases to allow such suits to be brought in the Civil Court, but this view has now been departed from.

Mr. Justice PIGGOTT has very clearly discussed and put the present point of view in *Baijit* v. *Mahipat* (1). We are in full agreement with his view. The plea of sub-tenancy has been heard and finally determined by the only court capable of entertaining it, and the present suit of the plaintiff to have the decision of the Revenue Court set aside must fail.

For these reasons we agree with the decision of the learned Judge of this Court and dismiss the appeal with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Gokul Prasad.

BHOJ RAJ (PLAINTIFF) *v.* HARDEVA AND OTHERS (DEFENDANTS) *

1922

June, 6.

Act No. V of 1882 (Indian Easements Act), section 59—Licence—Power to cancel licence—Licence for erection of thatched sheds not appurtenant to holding of licensee.

Certain tenants, with the permission of their zamindar, erected some thatched sheds on waste land belonging to the zamindar. Neither the land nor the sheds were appurtenant to the tenants' agricultural holding. After these sheds had been in existence for some twenty years, the zamindari was sold to the plaintiff. *Held* that the plaintiff was not debarred from cancelling the licence in pursuance of which the sheds had been erected.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The judgment under appeal was as follows :—

"The learned District Judge has found that the defendants have occupied the land in suit for more than 20 consecutive years for the purpose of tethering their cattle and have constructed cattle troughs and huts upon

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* Appeal No. 61 of 1921, under section 10 of the Letters Patent.

(1) (1918) I. L. R., 41 All., 203.

it. He considers that they are licensees and applies the provisions of section 60, Act V of 1882, holding that they can be ejected at the will of the zamindar, who can revoke their licence at his pleasure. The land in question is land outside the inhabited area. The principles governing the case are, I consider, the same whether the land be in the inhabited area or outside it. These principles I have enunciated at some length in Second Appeal No. 1619 of 1918, *Syed Aqaz Husain v. Ali*, which I decided on the 15th of February, 1921, and *Sri Thakur Radha Krishnaji Maharaj v. Bakeshwar Nath Rai*, Second Appeal No. 431 of 1919, which I decided on the 17th of March, 1921. The view that I have taken in those cases is, shortly, this:—That when a zamindar has granted to a tenant in an agricultural village in this province permission to use a piece of waste land to satisfy his reasonable requirements in the way of tethering cattle or doing similar acts connected with his employment, he cannot revoke the licence at his will after the tenant has enjoyed the privilege for more than 12 years. I know that this view is not accepted by all the judges in this Court. I believe that it is not accepted by the majority. This is not a question that can be decided upon rulings because there are many conflicting rulings.

I do not propose to refer the point to a Full Bench, as I believe my decision in second appeal No. 1619 of 1918 has already gone up under Letters Patent Appeal. I do not propose to change the view which I have taken in previous cases. I therefore allow this appeal and direct that the plaintiff's suit stand dismissed and that the plaintiff pay his own costs and those of the defendants appellants in all courts."

Munshi *Panna Lal*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

MEARS, C. J. and GOKUL PRASAD, J.:—This appeal arises out of a suit brought by the plaintiff (appellant) to recover a certain plot of waste land in the village from the defendants who, according to the plaintiff's allegation, have erected certain thatched sheds and cattle troughs without his permission a short time ago.

The defence raised was (1) that the sheds were 25 years old, (2) that the plaintiff had lost title because of want of possession for 12 years, and (3) that these constructions were necessary for the defendants' cultivation in the village, or, in other words, that they were appurtenant to their holding.

The first court dismissed the suit on the ground that it was barred by time because the plaintiff had not proved his possession within 12 years of suit.

The lower appellate court found, in concurrence with the first court, that the constructions were more than 20 years old and that the defendants were mere licensees; that the plaintiff having got the property from the original licensors by virtue of transfer, the licence ceased to exist, having regard to section 59 of the Indian Easements Act (V of 1882), and the defendants were liable to ejectment. It accordingly decreed the plaintiff's suit.

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The defendants came up in appeal and a learned Judge of this Court has dismissed the plaintiff's claim on the ground that a zamindar cannot revoke a licence like this at his will after the tenant has enjoyed the privilege for more than twelve years. As a general proposition of the law, we cannot accept this statement of the law as correct. A licensee cannot by enjoying the licence for any length of time acquire rights adverse to that of the licensor. The question whether a certain class of land is appurtenant to the holding of a tenant is one of fact depending upon the circumstances of each particular case. In this case, as we have stated above, the lower appellate court has found that the defendants did not hold the plot in suit or the constructions thereon as appurtenances to their holding. On this finding and the further fact that the plaintiff was a transferee from the original licensor, the licence had ceased to exist by operation of law and the plaintiff was entitled to a decree. We, therefore, allow this appeal. As a claim based upon false allegations by a zamindar is one which does not meet with our approval, we refuse him his costs in all courts. The result is that the judgment of the learned Judge of this Court is set aside and the plaintiff's claim is decreed, but without costs.

Appeal decreed.

MATRIMONIAL JURISDICTION.

Before Sir Grimwood Mears, Knight, Chief Justice, Mr Justice Walsh and Mr Justice Gokul Prasad.

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June, 6

WILLIAM FITZROY HOWARD (PETITIONER) *v.* DORIS MAY HOWARD (RESPONDENT) AND THOMAS DENNET (CO-RESPONDENT) *

Suit for dissolution of marriage—Procedure—Necessity of examining petitioner on oath.

In all divorce cases the petitioner must come into the witness box, he must be sworn, and he must prove his case, because, amongst other things, the Judge has to satisfy himself whether there is any collusion between the parties, and he has further to satisfy himself as to the complete honesty and truth of the petition.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard*, for the petitioner.

The respondent and co-respondent were not represented.

MEARS, C. J., WALSH and GOKUL PRASAD, JJ. :—On the 24th of August, 1921, Mr. Sherring, sitting as District Judge

* Matrimonial Reference No. 11 of 1921.

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WILLIAM FITZROY HOWARD v. DORIS MAY HOWARD

at Lucknow, granted a decree *nisi* to William Fitzroy Howard. The petition set out the marriage, the cohabitation of the parties, and the birth of a child, and the subsequent death of that child, and then alleged that on the 4th of August, 1917, and on other days between that and December, 1920, the wife committed adultery with Thomas Dennet, the co-respondent "with whom she is living now and has an illegitimate child by him." There does not appear to be on the record any answer by the respondent or co-respondent. The next document we have after the register of marriage is one which is headed "In the Court of the District Judge." The suit is described as "Regular Suit No. 4 of 1921" and sets out the names of the parties and then states, "Petitioner, the respondent and the co-respondent are present." Then it immediately begins by saying that "Doris May Howard, the respondent, states that she was married to the petitioner on the 24th of April, 1916, at the Roman Catholic Church, Lucknow Then she admits that she gave birth to a female child on the 3rd of July, 1920, and that the petitioner is not the father. She denies ever having had connection with the co-respondent. Thomas George Dennet denies ever having had connection with the respondent since her marriage with the petitioner. Mr. Ali Ausat states that he does not wish to take action as regards the co-respondent and claims no damages against him. The co-respondent admits that he lives in Lucknow." That is apparently the whole of what Mr. Sherring thought to be evidence in the case. On the contrary, not a word of it is evidence. In all divorce cases the petitioner must come into the witness-box, petitioner must be sworn and he must prove his case, because, amongst other things, the Judge has to satisfy himself whether there is any collusion between the parties, and he has further to satisfy himself as to the complete honesty and truth of the petition. Here the petitioner does not appear to have gone into the witness-box. The respondent does not appear to have been put on oath, nor does the co-respondent; and in this state of circumstances Mr. Sherring thought that he was entitled to grant the petitioner a decree. We are of opinion that the decree *nisi* must be set aside, and having regard to the admission of Mr. Ali Ausat, the petitioner may find himself in a difficulty in regard to the institution of another suit, because if he now commences fresh proceedings and makes Mr. Dennet co-respondent, some questions will

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necessarily arise as to what happened when on the 24th of August, 1921, Mr. Ali Ausat was content that the co-respondent should be dismissed from the suit and that the decree *nisi* should be passed upon the basis that the child born on the 3rd of July, 1920, was the child of some unknown man. In the circumstances Mr. Howard is at liberty, if he is so minded, to file a fresh petition; but he must insert in that petition a statement of the institution of this suit and its result,—that is in accordance with the divorce practice as it prevails in England,—and if he proposes to proceed on the basis of his wife's adultery with a man unknown, he must obtain leave from the Court to dispense with the making of a co-respondent. At the same time we think it right to point out that this case, both as regards the materials in the petition and as regards the statements of the parties, leaves us in some doubt as to the good faith of the parties, and it is very necessary, if there is another attempt of Mr. Howard to obtain a decree *nisi*, that he should put the whole of his case in the greatest fullness of detail before the Court. The decree *nisi* is therefore set aside. We direct that a copy of this judgment be sent to Mr. Sherring personally by registered post.

APPELLATE CIVIL.

Before Mr Justice Ryves and Mr Justice Stuart

HARI RAM AND OTHERS (PLAINTIFFS) *v.* INDRAJ AND OTHERS (DEFENDANTS) *

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June, 7.

Mortgage—Redemption—Second suit for redemption after dismissal of first suit for failure to pay the amount decreed—Res judicata

Where the decree in a suit for redemption of a mortgage merely provided that in default of payment of the mortgage money due the suit should be dismissed, and the money was not paid and nothing further was done, it was *held* that it was open to the mortgagor to sue again for redemption of the same mortgage. *Sita Ram* v. *Madho Lal* (1) followed.

THE facts of this case are fully set forth in the judgment of RYVES, J.

Dr. *Surendra Nath Sen*, for the appellants.

Mr. *E. A. Howard*, for the respondents.

* Second Appeal No. 437 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 17th of January, 1921 confirming a decree of P. K. Roy, Subordinate Judge of Meerut, dated the 15th of June, 1920.

(1) (1901) I. L. R., 24 All., 44.

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REYES, J. :—In this appeal two important and difficult points of law arise, and our attention has been drawn to a number of decisions of the various High Courts in India, more or less relevant. I think, however, that we are bound by two Full Bench decisions of this Court, and, therefore, need not consider nor discuss any other cases.

The facts are as follows, so far as they are relevant :—The father of the present plaintiffs brought a suit in 1905 in the court of the Munsif of Ghaziabad to redeem the simple mortgage now in suit, and obtained a decree for redemption on payment of Rs. 2,647-11-2 within six months of the date of the decree. The decree went on to say, "otherwise the suit will be considered dismissed."

The money was not paid and the defendants recovered their costs. Nothing further was done until the present plaintiffs brought this suit in the court of the Subordinate Judge of Meerut to redeem the same mortgage on payment of Rs. 2,647-11-2 (as found due in the previous suit). The defendants to this suit were defendants in the previous suit or their transferees.

Two main defences were raised :—(1) that this suit was barred by the rule of *res judicata*; (2) that, no previous tender having been made, it was premature.

Both these contentions were upheld by the two lower courts, which dismissed the suit. Hence this appeal. Both findings of law are challenged in appeal.

The second point can be disposed of at once. The recent Full Bench case, *Raghunandan Rai* v. *Raghunandan Pande* (1) (which was decided subsequently to the decision of the lower courts), lays down that a tender under section 83 of the Transfer of Property Act is not a necessary condition precedent to a suit for redemption.

There remains the first point. Did the decree in the previous suit extinguish the mortgage, or can the plaintiffs, even if it did not, maintain this suit in the face of the previous decree ? This puts the defendants' case at its broadest. It seems to me that, so far as we are concerned, we are bound by the Full Bench ruling in *Sita Ram* v. *Madho Lal* (2) and must be guided by that decision if it is applicable.

It is true that the mortgage there was usufructuary, whereas here it is simple. I do not think this, in any way,

(1) (1921) I. L. R., 43 All., 638.
(2) (1901) I. L. R., 24 All., 44.

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affects the *ratio decidendi* of the ruling. In *David Hay* v. *Razuddin* (1) the mortgage was also usufructuary, but the learned Judges who decided that case were at pains to point out that this circumstance was not considered by them as material to the question of law which they decided. It was this ruling which necessitated the Full Bench, in order to consider whether it was correct, and the Full Bench definitely overruled it. Incidentally I may note that one of the grounds on which the decision in *Hay's case* was based, and which was repeated here, was that the Legislature contemplated that there should be one suit, and only one, for redemption. This view, which prevailed in this Court for some time, was held to be untenable by the Full Bench.

The question referred to the Full Bench was quite general. KNOX, A. C. J., in the opening of his judgment, says:—

"What we have now to consider and determine is whether a mortgagor who has obtained a decree for redemption, which does not contain a provision that if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such decree was obtained." pp. 47-48.

The decree in the Full Bench case was unusually worded. It provided that on default of payment "the judgment should, after the expiry of the time fixed in the decree, be considered "*ma adum*"—translated by KNOX, A. C. J., as "annihilated," and by BANERJI and AIKMAN, JJ., as "non-existent."

The learned Judges concurred in holding that a mortgagor has an unfettered right to sue for redemption unless that right has been extinguished by act of the parties or by an order of a court. They go on to say that, having regard to the provisions of sections 92 and 93 of the Transfer of Property Act (which sections were in force when the decree in 1905, in this case, was passed), the proper decree in a redemption suit should have ordered, under the last clause of section 92, that in default of the payment directed under the previous provisions of that section the mortgaged property be sold.

Then, under section 93 it was open to the mortgagee to apply for the sale of the mortgaged property, in which event the court "shall order that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale

(1) (1897) I. L. R., 19 All., 202.

(after defraying throughout the expenses of the sale) be paid into court and applied in payment of what is due to the defendant (mortgagee), and that the balance be paid to the plaintiff." The section goes on to say that, "On the passing of any order under this section, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished."

The Full Bench held that unless the defendant obtained an order of sale as provided in section 93, the mortgage was not extinguished, and that, therefore, the equity of redemption remained intact and the mortgagor's right to redeem still subsisted.

At the same time, however, it was pointed out that even if the decree in the redemption suit was not drawn in accordance with the law, nevertheless it might be so worded that, if allowed to become final, it would bar a second suit for redemption by the rule of *res judicata*, and, as a case in point, reference was made to *Ramasami* v. *Sami* (1), where the decree provided that in default of payment within the period fixed by the court, "the mortgagor shall be debarred from redeeming" the property afterwards.

What I think, therefore, we have to do here is to construe the decree in the previous case of 1905, and see whether, though not framed in accordance with law, it has declared that the result of non-payment was then decided by the decree to involve the extinguishment of the mortgage, and so debar the plaintiffs from ever again suing to redeem.

Mr Howard for the respondents strenuously argues that this is so. He says:—The suit was a suit for redemption, it was decreed and the amount, very different from that alleged by the plaintiffs, was determined and the plaintiffs were given a fixed time within which to pay that amount, in which case their suit would be decreed with the necessary consequences; if they failed to pay in the money as directed, their suit "would be considered dismissed." This, he argued, meant that the court held that failure to pay in time involved not only that the suit was dismissed, but that any subsequent suit must be dismissed, because the decision amounted to a declaration that the right to redeem had been extinguished.

(1) (1893) I. L. R., 17 Mad., 86.

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The decree certainly does not say so, nor does it say anything about the extinguishment of the relations of mortgagor and mortgagee, or that the right to redeem will henceforth be barred (as in the Madras case cited *supra*).

I think the reasonable interpretation (in the absence of anything obviously to the contrary) is to hold that the decree means what it says, that is that the suit will be dismissed, leaving the parties in the position they occupied when the suit was brought. A similar interpretation was put by the Full Bench on the decree in the case before it.

To hold otherwise would mean that the court deliberately intended that the plaintiffs should be debarred, in the event of their failure to pay the decretal amount in time, from obtaining the possible advantage they might be entitled to, if a proper decree had been prepared and if the proper procedure indicated in section 93 had been adopted by the mortgagees. It might be that only a part of the mortgaged property would have had to be sold to satisfy the mortgage debt, in which case the surplus of the sale moneys, if any, and the balance of the property unsold, would go to the mortgagors plaintiffs, free of all liability, because the mortgage debt and the security for it, would both be extinguished.

In the face of very clear and unmistakable words in the decree, I would be loath to give it this unnecessarily broad interpretation.

In my opinion the appeal should be allowed, the decrees of both lower courts be set aside, and the case returned to the trial court through the district court to be restored to its original number and tried according to law. Costs throughout to be costs in the cause.

STUART, J. :—I concur. I have nothing to add to the decision that the suit is not premature, and very little to add on the remaining point.

In view of the Full Bench decision in *Sita Ram* v. *Madho Lal* (1) there seems to me to be only one question which requires an answer. Did the decree of 1905 expressly or impliedly debar the plaintiff from redeeming in a future suit, and extinguish his right of redemption unless he paid the amount decreed within the time prescribed? I would, agreeing with my learned brother, answer that question in the negative. The appeal should, therefore, be allowed.

(1) (1901)-I. L. R., 24 All., 44.

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BY THE COURT:—The appeal is allowed. The decrees of both lower courts are set aside. The suit will be remanded to the trial court, through the District Judge, to be restored to its original number and tried according to law.

Appeal decreed.

Before Mr Justice Ryves and Mr Justice Gokul Prasad

JAN AND SON (DEFENDANTS) v A. CAMERON (PLAINTIFF) *

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June, 7.

Act No IX of 1872 (Indian Contract Act), section 151—Hotel keeper—Liability of hotel-keeper for safe custody of property of guests.

The liabilities of a hotel-keeper to his guests are regulated by the Indian Contract Act, and in the absence of any specific agreement in a given case, the rules in Chapter IX of that Act will apply

Where, therefore, the property of a guest at a hotel was stolen from his room while he was at dinner in a different part of the hotel building, and it was found that the room occupied by him was to the knowledge of the hotel-keeper in an insecure condition, which the latter had taken no steps to rectify, it was *held* that the hotel-keeper was liable. *Rampal Singh* v *Murray & Co* (1) referred to

THE facts of this case are fully set forth in the judgment of the Court.

Dr *Kailas Nath Katju*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondent.

RYVES and GOKUL PRASAD, JJ.:—The facts out of which this appeal arises are these:—The plaintiff (respondent), who is a commercial traveller, went to Cawnpore, in September, 1918, and put up as a guest at the Civil and Military Hotel, Cawnpore, which was owned by the defendant (appellant). While staying in the hotel, he alleged that a suit-case of his, containing valuables to something over Rs. 3,000 in value, was stolen from the room he occupied, while he was at dinner in another part of the building. He claimed to recover the value of the stolen goods from the defendant on the ground that the loss was due to the neglect of the defendant in keeping the premises in an unsafe condition. The defendant (appellant), among other pleas, pleaded that if the theft was committed, it was due to the fault or connivance of the plaintiff's own servant and that the defendant was not liable, and that the defendant had kept proper care and had taken proper steps to provide for the security of travellers staying in the hotel, and that there was no negligence on his part. The trial court

* Second Appeal No. 1526 of 1920, from a decree of L. S. White, District Judge of Cawnpore, dated the 30th of July, 1920, confirming a decree of Ganga Prasad Varma, Subordinate Judge of Cawnpore, dated the 25th of August, 1919

(1) (1899) I. L. R., 22 All., 164.

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came to the conclusion that there was no statute law in India applicable, and held that, therefore, it must be guided by the common law in England. Having found that it was not proved that the plaintiff had in any way been negligent, and that under the common law of England it was unnecessary for the plaintiff to prove that there was any negligence on the part of the defendant, and that if goods were lost in an inn the innkeeper was *primâ facie* liable and that the *onus* lay on him to prove otherwise, it decreed the suit. On appeal, this decree and the reasons for it were maintained by the learned District Judge. On appeal to this Court objection was taken to the finding on the point of law arrived at by the court below. That decision was based largely on the case of *Whateley* v. *Palanji Pestanji* (1). That was a case referred to the Court of Small Causes in Bombay to the High Court, and, from the opening words of the judgment of the High Court, it would seem that the case was one concerning a hotel situated in the Island of Bombay, for the opening words are :—" There is no law but the common law of England to regulate the relation of innkeeper and guest in Bombay, in a case between a European and a Parsi." It is argued for the respondent that in the absence of any statute law dealing with the subject in this country, the common law of England should be applied. It was, however, pointed out by their Lordships of the Privy Council in the case of *Waghela Rajsanji* v. *Shekh Masluddin* (2), that that is so, but only if the rules of English law are found applicable to Indian society and the circumstances. There can be no doubt that hotels are built and managed very differently in England and in India, more certainly so in the mufassil parts of India at the present time. Owing to the climate and for other reasons, the quarters in which the residents live in Indian hotels are much more open and unconfined than in England. Unlike an English hotel, an Indian hotel is more or less a thoroughfare to which the public have free access—pedlars with their wares, unemployed servants seeking employment, and so on—including snake-charmers, jugglers and such. It is also the custom in India for guests to take private servants with them, who have access not only to their master's rooms but also have opportunities of access to the rooms occupied by other persons, and menial servants

(1) (1866) 3 Bom. H C Rep., 137.
(2) (1887) L. R., 14 I. A., 89 (96).

must be employed and have of necessity frequent access, at least to the bath-rooms. We may point out that even in England the common law was greatly modified in favour of the inn-keeper by the Inn-keepers' Liability Act of 1863 and other Acts. Under these circumstances, it would be quite impossible to apply the common law of England, in force against inn-keepers, in the mufassil in India.

There is nothing to show that the Bombay decision was meant to apply, or has any application, to the mufassil of India That case, also, was decided in 1866, before the Indian Contract Act was passed. It seems to us that the liabilities of a hotel-keeper to his guests are now regulated by the Indian Contract Act, and in the absence of any specific agreement in a given case, we think that the rules in Chapter IX of the Indian Contract Act would apply. The case of *Rampal Singh* v. *Murray & Co* (1) would seem to confirm this view, although it is not fully applicable to the facts of this particular case.

It is remarkable that (so far as we know) there is no reported decision in any of the Indian Courts on the subject. Having come to the conclusion, when the appeal was first heard by us, that while the decree of the courts below could not be maintained on the ground taken by those courts, we thought it necessary, before deciding the case, to send down an issue as to whether the defendant had taken such care of the goods of the plaintiff as was required by section 151 of the Indian Contract Act. In other words, we thought the Indian Contract Act was applicable. The parties were allowed to give such further evidence on this issue as they desired, and the learned District Judge has found as a fact as follows:—The hotel building is divided into two main blocks, the public and dining rooms and some residential rooms are in one block, and other dwelling rooms are in a separate block at some distance from the main block. The detached block of dwelling rooms consists of a verandah, extending the whole length of the building, six sleeping rooms leading into two bath-rooms each at the rear, and each bath-room has a door leading out to the back. It is found that at the back of this block there is an open unfenced maidan, so that any one who pleased could have access to the back of these quarters. It was also found that the bath-room, connected with the sleeping room which the plaintiff occupied, was unsafe and could easily be entered

(1) (1899) I. L. R., 22 All., 164.

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from the back. It was admitted that the plaintiff had a servant with him, and that on the evening of the 27th of September, at about 8 o'clock when the plaintiff went to the main building to have his dinner, this servant was left in or about the room; that shortly afterwards, the suit-case was stolen from the room. It is found that the plaintiff's servant followed the thief unsuccessfully. It is also found that there had been two other thefts within the year in the hotel to the knowledge of the manager, and it is not denied by him, as asserted by the plaintiff, that his notice had been brought to the unsafe condition of the bath-room. On the evidence, the court has come to the conclusion that the defendant had not taken such care to ensure the safety of the property of the guests as a man of ordinary prudence would, under the circumstances, take of his own goods, and that there was negligence on his part. In other words, the finding is against the defendant. Objection is taken to the finding, mainly on the ground that as the plaintiff actually had a servant in his own employ and had left his servant in or near the room at about the time the theft took place, the defendant was absolved from liability, and that, at any rate, so far as this plaintiff was concerned, there was no obligation for the defendant to take special care to ensure the safety of his goods. We are not prepared to accept this argument. It was the duty of the defendant to keep his premises in such a condition of safety as would reasonably prevent theft. The finding here is that the whole of the back of the detached premises was unsafe, that the fact that it was unsafe had been brought to the notice of the defendant and that, therefore, he should not only have had the doors repaired, but that he should have had a watchman at the back of these premises as the only means of ensuring safety, and prevent anybody entering the premises if he had a mind to do so. In our opinion, on this finding, which is one of fact, binding on us in second appeal, the appeal fails and it is dismissed with costs.

Appeal dismissed.

Before Mr Justice Stuart and Mr Justice Sulaiman

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June, 7.

KEDAR NATH AND ANOTHER (DEFENDANTS) v DATTA PRASAD SINGH (PLAINTIFF) AND MURLI DHAR (DEFENDANT) *

Haq-i-chaharum—*Custom—Vendor and purchaser—On whom rests the liability for payment of* haq-i-chaharum

Where the existence of a custom of payment of *haq-i-chaharum* to the zamindar on the sale of house property has been proved, and it does not appear that the zamindar's right to such payment is limited to a right to claim it from the vendor alone, it is the duty of the purchaser to see that the *haq* due to the zamindar is duly paid He cannot relieve himself of his responsibility by simply paying the full sale consideration to the vendor. *Dhandai Bibi* v *Abdur Rahman* (1) and *Heera Ram* v *The Hon'ble Sir Raja Deo Narain Singh* (2) referred to

THE facts of this case are fully stated in the judgment of the Court.

Dr *Surendra Nath Sen*, for the appellants.

Babu *Sital Prasad Ghosh*, for the respondents.

STUART and SULAIMAN, JJ. :—Second Appeals Nos. 449 and 606 of 1921 are connected These are cross appeals by the plaintiff and defendants, respectively, arising out of the same suit. The plaintiff zamindar brought a suit to recover one-fourth of the sale-proceeds together with interest, on account of a sale-deed, dated the 14th December, 1916, executed by the defendants second party in favour of the defendants first party in respect of seven shops and two houses, including one ruined house in the form of a *chabutra* or platform. The plaintiff's case was that he is the owner of the sites of all these houses and that under a custom which prevails in the village of Mursan, where the property sold is situated, the zamindar is entitled to claim his *haq-i-chaharum*. On behalf of the defendants the custom alleged by the plaintiff was denied and it was further pleaded that the inhabitants of the village of Mursan which was alleged to be a town and not a mere agricultural village, were absolute owners of their houses and lands and had a right of sale, and it was further pleaded that the defendants had been in adverse possession of the property in suit and the plaintiff was not entitled to any relief.

The court of first instance, in a very careful and well-reasoned judgment, decreed the claim of the plaintiff for recovery of one-fourth of the sale-proceeds together with interest at 6 per cent. per annum, but dismissed the claim as

* Second Appeal No 606 of 1921, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 17th of January, 1921, confirming a decree of Nawab Husain, Munsif of Hathras, dated the 28rd of August, 1920.

(1) (1901) I. L. R., 23 All., 209.

(2) (1867) N.-W. P., H. C. Rep. (F. B. R.), 63.

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regards the recovery of possession. This decree was affirmed on appeal by the learned District Judge.

The plaintiff in his appeal contends that the decree dismissing his claim as to the recovery of possession was not correct. It appears that in the court of first instance, during the pendency of the suit as well as during the course of its hearing and arguments, it was admitted on behalf of the plaintiff that the owners of houses in this village are also the owners of their sites and that both can be transferred by them to strangers. This admission alone is sufficient to dispose of the appeal of the plaintiff. If the defendants are owners of the sites of the houses, it is quite clear that the plaintiff is not entitled to recover possession of those sites on their sale. Furthermore, there is a good deal of evidence on the record which goes to show that persons whose houses have fallen down have still a right left to them to transfer the sites. It did not, also, appear that this platform had really been abandoned by the last occupier and had become an ordinary piece of *parti* or waste land. In view of all these circumstances, both the courts below were of opinion that the plaintiff was not entitled to get a decree for actual possession of the sites. We think that this view was correct. Second Appeal No. 449 of 1921 accordingly fails

The other appeal is an appeal by the defendants vendees in which they challenge the finding of the courts below that there is a custom under which the plaintiff was entitled to recover *haq-i-chaharum*. Although there are concurrent findings of both the courts below, nevertheless it is open to the appellant to show to us that the evidence adduced by the plaintiff is legally insufficient to prove the custom relied upon by him.

The evidence to prove the custom appears to be fairly voluminous. On behalf of the plaintiff, in the first instance, there is an entry in the *wajib-ul-arz* of 1873 which clearly states that in this village the zamindar has a right to recover one-fourth of the sale-proceeds in case of sales of houses by the inhabitants and the agricultural tenants of this village. It is true that at the time when this wajib-ul-arz was prepared, there was a single zamindar, the predecessor in title of the present plaintiff, and it is urged, therefore, that the recital therein was simply dictated by a single proprietor. This would merely reduce the value of the wajib-ul-arz, but there is this additional fact that the wajib-ul-arz was actually verified and attes-

ted by a number of residents and tenants and inhabitants of the village numbering 45 besides the patwari. In addition to this, we have a judgment of the year 1884 in which a claim to enforce this right against the mortgagor was actually decreed. The plaintiff has also produced 28 sale-deeds, on 22 out of which there are actual endorsements to the effect that one-fourth of the sale-proceeds have been paid. In respect of three of them, there are entries in the plaintiff's books that *haq-i-chaharum* was paid The plaintiff has also produced his account books from the year 1884 up to date of suit, which account books have been accepted by the courts below as genuine, and which go to prove that on each and every occasion when a sale took place, the zamindar did realize one-fourth of the sale-proceeds. In addition to this documentary evidence, there are some 50 witnesses produced to depose generally as to the existence of the custom alleged by the plaintiff and the realization of *haq-i-chaharum* by him and his predecessor.

The defendants produced a number of sale-deeds, all of which were prior to the year 1884, and they relied on the circumstance that in four of them, which are originals, there are no endorsements of payment. As to other documents, they are merely copies. The fact that no *haq-i-chaharum* was paid is not proved by these deeds. The four original documents which were produced were prior to the date of 1884, and the plaintiff was not able to produce account books prior to 1884 because those account books had been filed in an earlier suit and were never taken back. Even the defendants' witnesses admitted that the plaintiff tried to realize his *haq-i-chaharum* from each and every person liable for the same, but stated that he realized *haq-i-chaharum* from those vendors who were willing to pay them. The evidence adduced by the plaintiff was voluminous and has been carefully considered by both the courts below. They are agreed in finding that the plaintiff has succeeded in proving an universal and ancient right to recover *haq-i-chaharum*. Nothing has been shown to us in argument which would justify us in differing from the view taken by the courts below. The case has been approached from the right point of view by the courts below and there is no legal defect in the reasoning adopted. We are accordingly unable to differ from the view taken by the courts below The result is that the finding of fact must be accepted.

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It is, however, contended by the learned advocate for the defendants (appellants) that in any case this right cannot be enforced against the vendees, and that even if there was a custom of *haq-i-chaharum*, the right can only be enforced against the vendor who has been paid the full sale consideration. This point, however, is governed by authority. The rule of law was laid down clearly in the Full Bench case of *Heera Ram* v. *Hon'ble Sir Raja Deo Narain Singh* (1). In that case it was clearly pointed out that "the zamindars' customary due is payable on the transfer by sale of house property; and this equally (after the sale has become absolute) whether the sale was, in its inception, conditional or not. The zamindars' right is to a share of the purchase money; it is not merely a right to claim that share from the vendor. It is, therefore, incumbent on the purchaser, if he would acquit himself of all liability, to see that the zamindar is satisfied in respect of his due, and he cannot discharge himself by a payment to the vendor." The learned Judges in that case pointed out that both the vendor and the vendee were primarily liable to the zamindar and the zamindar had a claim against both, although the vendee may, if he has any such right, ultimately re-imburse himself from the vendor. A different consideration might arise in the case of a right arising out of contract between the zamindar and occupier, but if the right is based on custom, then it has been held that it is the duty of the vendee to see that *haq-i-chaharum* is paid to the zamindar. The vendee cannot get rid of his liability by merely proving that he has paid the whole consideration to the vendor. He ought to see that the one-fourth of the sale price actually goes to the zamindar. If the zamindar had not had his share, a joint decree should be passed against the vendor and the vendee, leaving the matter to be decided in a subsequent suit. This has been followed in a number of cases by this Court. We may only refer to the case of *Dhandai Bibi* v. *Abdur Rahman* (2), where it was pointed out that in the case of a customary right to receive *haq-i-chaharum*, where it did not appear that the zamindar's right to a share of the purchase money was limited to a right to claim it from the vendor alone, the right can be enforced against the vendee also. In the present case we have carefully read the wajib-ul-arz which records the custom relied upon by the plaintiff and we are convinced that the right to

(1) (1867) N.-W. P., H. C. Rep. (F. B. R.), 63.
(2) (1901) I. L. R., 23 All., 209

recover *haq-i-chaharum* was in no way limited to a claim against the vendor alone. That being so, the joint decree passed by the court of first instance, which was affirmed on appeal by the lower appellate court, was correct. The result is that appeal No. 606 of 1921 also fails.

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We accordingly order that both appeals Nos. 419 and 606 of 1921 be dismissed with costs.

Appeal dismissed.

Before Mr Justice Piggott and Mr Justice Sulaiman

BADR-UD-DIN (OBJECTOR) v MUHAMMAD HAFIZ AND ANOTHER (DECREE-HOLDERS).*

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June, 12.

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 182 (5)—Execution of decree—Limitation—First application for arrest of judgment-debtor—Second application for arrest of judgment-debtor and secondarily of his sureties.

Held that an application for execution of a decree by arrest of the judgment-debtor will operate to save limitation in respect of a subsequent application in which the prayer was, first, for the arrest of the judgment-debtor, and secondly, for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor *Muhammad Hafiz* v *Muhammad Ibrahim* (1) referred to

THE facts of this case sufficiently appear from the judgment of the Court and from the report in the previous case of *Muhammad Hafiz* v. *Muhammad Ibrahim* (1).

Munshi *Sarkar Bahadur Johari*, for the appellant

Munshi *Narain Prasad Asthana*, for the respondents.

PIGGOTT and SULAIMAN, JJ. —This appeal represents a further stage in certain execution proceedings which have been once already before this Court, *vide* the case of *Muhammad Hafiz* v *Muhammad Ibrahim* (1) The appellant now before us, Sheikh Badr-ud-din Khan Bahadur, is one of the two sureties who bound themselves for the satisfaction of a certain decree. One of the points taken in appeal before us is as to the interpretation of the security bond and the nature of the obligations thereby undertaken by the sureties. We do not say, for a moment, that Sheikh Badr-ud-din Khan Bahadur, who was not a party to the appeal before the Court in the reported case referred to, is not entitled to be heard on this point; but, having heard him, we are still of opinion that the terms of the security bond were rightly interpreted by this Court when delivering the aforesaid judgment. The

* Second Appeal No 1627 of 1921, from a decree of T K Johnston, District Judge of Agra, dated the 10th of August, 1921, confirming a decree of Ihtikhar Husain, Subordinate Judge of Agra, dated the 11th of July, 1921.

(1) (1920) I. L. R., 43 All, 152

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result is that one of the obligations, jointly and severally assumed by the two sureties, was the satisfaction of the entire decree, in the event of the judgment-debtor, Muhammad Ibrahim, failing to satisfy it. The only further question that can be raised is one of limitation. It has been pointed out to us that the first time when proceedings were taken against the present appellant was in the month of October, 1920. We have already decided in the reported case that an application for execution, dated the 6th of March, 1918, where execution was sought by arrest of the person of the judgment-debtor, was not barred by limitation on the date on which it was made. We are still of the same opinion. Now the question is whether that application saves limitation for the application of the 25th of October, 1920, in which the prayer was for recovery of the amount of the decree by arrest of the judgment-debtor in the first place, or, failing satisfaction by that means, by proceedings against the persons of the two sureties. If that application was in time, then the application now before us is also in time. The question really depends on the manner in which the provisions of section 145 of the Civil Procedure Code are to be applied to those of article 182 of the Schedule to the Indian Limitation Act (IX of 1908). We are of opinion that the view taken in the reported case was correct and that it practically governs also the case now before us. It has been noted by us that the learned Judges of the Bombay High Court have since then, in the case of *Cholappa Bin Gattinha Sauna* v. *Ramchandra Anna Pai* (1), distinguished against the previous decision of the same court which has been referred to before us in argument as supporting the case for the appellant. The case against the appellant really admits of being stated in the form of a dilemma. Either the effect of section 145 of the Code of Civil Procedure is to make the decree, in a case like the present, equivalent to a decree passed jointly against the original judgment-debtor and the surety or the sureties, or it has not that effect. If it has, then the case is covered by the closing words of Explanation (1) to article 182 of the schedule, and an application for execution against a judgment-debtor or against any one of the sureties affords a starting point for a fresh period of limitation, even though the application next made be against a different surety. On the other hand, if the effect of section 145 of the Civil Procedure Code be not as

(1) (1920) I. L. R., 44 Bom., 34.

suggested above, then the words of Explanation (1) aforesaid have no application whatsoever to a case like the one now before us and must altogether be excluded from consideration. In that case we are driven back to the words of clause (5) of article 182 itself. The point we have to decide is whether the application of the 6th of March, 1918, was or was not an application in accordance with law to the proper court for execution of the decree, or to take some step in aid of execution of the decree. We cannot answer that question otherwise than in the affirmative. We think the appeal fails and it is dismissed with costs.

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Appeal dismissed.

MATRIMONIAL JURISDICTION.

Before Sir Cromwood Mears, Knight, Chief Justice, Mr Justice Piggott and Mr Justice Walsh.

A. A. GARLINGE (PETITIONER) v. IRENE REBECCA GARLINGE (RESPONDENT) AND JOSEPH PRIOR (CO-RESPONDENT)*

1922 *June*, 12.

Divorce—Petition for dissolution by husband on the ground of adultery—Respondent not represented by counsel—Duty of petitioner to provide respondent with means of obtaining legal assistance—Practice.

Where, in a petition for dissolution of marriage upon the ground of adultery filed by the husband, the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from counsel as is reasonable in the circumstances, and the Court should take upon itself the duty of seeing that this is done.

THIS was a decree *nisi* for dissolution of marriage submitted to the High Court for confirmation. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Mr. *C. Thompson*, for the petitioner.

Babu *Saila Nath Mukerji*, for the respondent.

The co-respondent was not represented.

MEARS, C. J. and PIGGOTT and WALSH, JJ.:—This is a reference from the Court of the District Judge of Ajmer-Merwara, under section 17 of the Indian Divorce Act No. IV of 1869. The petitioner is Alfred A. Garlinge, described as a guard in the employment of the Bombay, Baroda and Central India Railway. The respondent is his wife, Irene Rebecca Garlinge, and the co-respondent is Joseph William Prior, employed in the Locomotive shops at Ajmer.

* Matrimonial Reference No. 9 of 1922.

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The fact that the petitioner and the respondent were married on the 16th day of May, 1910, and the further fact that one child was born of the marriage, a daughter, in the month of December, 1910, are admitted. The said daughter is still living and is referred to by the name of Dorothy in the evidence.

In the third paragraph of the petition it is alleged in general terms that soon after the marriage the respondent began to misconduct herself and continued in her evil conduct in spite of repeated promises to reform. A general allegation of this kind should have been struck off the record, nor should the Judge have permitted the petitioner, when giving evidence, to mention the names of two men with whom the respondent was said to have committed adultery in 1912, when he had not made that charge against her in the petition. Again, the Judge ought to have struck out the latter part of paragraph 4 where he says that by his absence in Mesopotamia his wife "found further opportunities for her misconduct." These general allegations are unfair and the Court should have protected the respondent by an order in these words :—" Para. 3 and the last eleven words of para. 4 to be struck out, unless within seven days the petitioner gives particulars in writing of the alleged misconduct, stating when, where and with whom the said misconduct took place "

From 1915 to 1920 the petitioner was on active service in Mesopotamia and returned to India in January, 1920, and admittedly came to Ajmer about the 27th of that month. There was a difference of opinion between the parties as to whether or not the wife should go and live with the husband when he received an appointment which made his headquarters station Abu Road, whereas the wife, the respondent, desired to remain at Ajmer. A suggestion has been put forward on her behalf that her only reason for refusing to go to Abu Road was that she was able to make better arrangements at Ajmer for the education of the daughter. This, however, along with many other circumstances in the case, has not been subjected to any satisfactory or adequate inquiry. The petitioner's own evidence on the point is inconsistent with the pleading set forth in the fifth paragraph of his petition. He there distinctly said that, in consequence of facts discovered by him within a week of his arrival at Ajmer, and therefore early in the month of February, 1920, he (the petitioner) left Ajmer

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and began to work at Abu Road, from whence he wrote to tell his wife that under no circumstances could he live with her any longer. Mr Garlinge's evidence at the trial in the court below is quite inconsistent with this plea. What he says is that on his return from field service, about the end of January, he was posted to Abu Road, whereupon his wife refused to accompany him there. During the months that followed, the petitioner's work took him backwards and forwards between Abu Road and Ajmer and he was continually pressing his wife to come to him at Abu Road, a request which she continued to refuse. The petitioner should not have been allowed to make a statement of this sort without being confronted with his own pleadings and asked to explain the discrepancy.

This makes it necessary for us to comment at once upon another most unsatisfactory feature of the trial in the court below. The wife had entered an appearance, she denied the allegations against her and she did as a matter of fact go into the witness-box and give evidence on oath. She was not represented by counsel, and it was the duty of the court to have seen that she was so represented. Where a petition of this nature is filed by the husband, and the wife enters an appearance and denies the allegations against her, she has an absolute right to require her husband to furnish her with funds sufficient to enable her to make a full and satisfactory defence, and to obtain such assistance from counsel as is reasonable under the circumstances, and the court should have taken upon itself the duty of seeing that this was done.

As a matter of fact the petition itself is, as we have already pointed out, full of vague and unsatisfactory allegations; although in the fifth paragraph it is distinctly alleged that the petitioner discovered that his wife was carrying on adulterous intercourse with the co-respondent Joseph Prior, no particulars are given, and on the wording of the paragraph the court is left to infer that the petitioner made this discovery early in the month of February, 1920. If that were the petitioner's case it would be a case unsupported by any shred of evidence.

[The judgment then went on to discuss the evidence at length, and concluded by refusing to confirm the decree *nisi* and dismissing the husband's petition with costs.]

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

1922 June, 14

AMINA BIBI AND ANOTHER (DEFENDANTS) *v.* SAIYID YUSUF AND ANOTHER (PLAINTIFFS) AND SAIYID ALI ZAFAR AND OTHERS (DEFENDANTS) *

Jurisdiction—Civil and Revenue Courts—Act (Local) No II of 1901 (Agra Tenancy Act), section 202—Lease for collection of rent and zamindari dues—Effect on position of lessee of avoidance of lease on the ground of fraud

A lease granted for the purpose of collection of rent and zamindari dues is not a lease granted for agricultural purposes within the meaning of section 202 of the Agra Tenancy Act, 1901

In any case, if a lease is void *ab initio* by reason of fraud or of the unsoundness of mind of the lessor, the lessee thereunder cannot be regarded as a tenant, but is merely a trespasser *Ali Jafar* v. *Phulmanda Kuer* (1), *Raghunath* v. *Ganesh* (2), and *Debi Bakhsh* v. *Ram Dhani* (3), referred to

THE facts of this case are fully set forth in the judgment of the Court

Babu *Piari Lal Banerji*, for the appellants.

Maulvi *Iqbal Ahmad* and Munshi *Kamalakanta Verma*, for the respondents.

LINDSAY and KANHAIYA LAL, JJ. :—The dispute in these appeals relates to a 6 annas 4 pies share of the village Bawanda, which originally belonged to Paighambar Bakhsh *alias* Abdullah, a retired Subordinate Judge of these provinces He had purchased the entire village in the name of his wife Musammat Allarakhi Bibi. She survived Paighambar Bakhsh and had by him two sons, Saiyid Muhammad and Saiyid Mahmud, and a daughter, Musammat Khudeja Bibi. She died in September, 1906 Her son Saiyid Muhammad had died in her life-time, leaving two sons, Saiyid Husain and Saiyid Mohsin. Musammat Khudeja Bibi had died a few days after her, leaving her husband, Saiyid Muhammad Zuber, as one of her heirs. On the death of Musammat Allarakhi, a dispute arose between her grandsons, Saiyid Husain and Saiyid Mohsin, her son Saiyid Mahmud, and Muhammad Zuber, the husband of Musammat Khudeja Bibi, each of whom claimed a right of inheritance to the said property. It was then disputed whether the real owner of that property was Musammat Allarakhi Bibi or her husband Paighambar Bakhsh. The Revenue Court allowed mutation of names to be effected in

* First Appeal No. 139 of 1920, from a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 6th of April, 1920.

(1) (1915) 13 A. L. J., 843

(2) (1919) I. L. R., 42 All., 222

(3) (1916) 19 Oudh Cases, 58.

favour of all the claimants without deciding to what share each of them was entitled.

During the life-time of Musammat Allarakhi, Saiyid Ali Zafar used to look after her property, getting a salary of Rs. 15 per mensem. He was her nephew. After her death, he continued to look after that property on behalf of Saiyid Mahmud and obtained a power of attorney from him on the 15th of February, 1908 (Ex. 53). Saiyid Mahmud was living in the village Salempur. Saiyid Ali Zafar lived in the same village. Saiyid Mahmud was married to Musammat Saleha Bibi, the niece of Maulvi Muhammad Usman, a pleader of Jaunpur. By her Saiyid Mahmud had two sons, Saiyid Yusuf and Saiyid Yamin, the plaintiffs in one of the suits which have given rise to these appeals, and a daughter Musammat Mariam Bibi, the plaintiff in the other suit. Musammat Saleha Bibi died on the 6th of March, 1898. The dower due to her by her husband Saiyid Mahmud had remained unpaid. Saiyid Mahmud is described by the plaintiffs as a man of weak intellect and deranged mind (*fatn-ul-aql*). It was also stated that he was unable to look after his affairs and incapable of managing his property. He neglected to look after the maintenance and education of his sons, who obtained an order against him, under section 488 of the Code of Criminal Procedure, for the payment of a monthly allowance of Rs. 15 to them. This order was not, however, obeyed. An application was then made by Maulvi Muhammad Usman, the paternal uncle of their mother, for his appointment as the guardian of their persons, in the court of the District Judge of Ghazipur. It was granted on the 31st of July, 1908. It was held in that proceeding that Saiyid Mahmud was of eccentric habits and incapable of looking after his children. Maulvi Muhammad Usman was, accordingly, appointed as their guardian. The children, thereafter, lived with Maulvi Muhammad Usman at Jaunpur.

Meanwhile, Saiyid Mahmud was making various transfers of the property of his mother, Musammat Allarakhi Bibi, including certain perpetual leases in favour of Saiyid Ali Zafar and other persons. One of these leases was executed on the 22nd of October, 1908, in respect of a 6 annas 4 pies share of the village Bawanda in favour of Saiyid Ali Zafar and Gopal Das, for a period of ten or eleven years. That lease is said to have related to the 6 annas 4 pies share, regarding

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which there was a dispute between Saiyid Mahmud on the one side, and the sons of Saiyid Mahmud and Muhammad Zuber on the other. The latter claimed that the property had really belonged to Paighambar Bakhsh and not to Musammat Allarakhi Bibi, while the case of Saiyid Mahmud was that it was the property of his mother, Musammat Allarakhi. On the same date another lease was granted by Saiyid Husain, Saiyid Mohsin and Muhammad Zuber in respect of the remaining 9 annas 8 pies share in favour of Saiyid Ali Zafar and Gopal Das for a similar period.

When Saiyid Yusuf attained majority, a suit was filed by him, on behalf of himself and as guardian of his minor brother, Saiyid Yamin, for the recovery of the dower due to them and their sister Musammat Mariam Bibi and to their maternal grandfather Abid Husain, against Saiyid Mahmud. Musammat Mariam Bibi and the heirs of Abid Husain were also impleaded as defendants. Maulvi Muhammad Usman had already withdrawn from the guardianship of Saiyid Yusuf and Saiyid Yamin by an application made by him to the District Judge of Ghazipur on the 1st of May, 1913. The plaintiffs tried to get Saiyid Mahmud declared a lunatic and to have a guardian *ad litem* appointed for the purpose of that proceeding, but the court before which that suit was pending summoned Saiyid Mahmud and, after examining him, came to the conclusion that Saiyid Mahmud was not so devoid of his senses as to be unable to prosecute his defence. It refused, therefore, to appoint a guardian *ad litem* to conduct the defence on his behalf. The suit proceeded to judgment and was eventually decreed on the 22nd of April, 1914 (Ex. KK). In execution of the decree so obtained, an eight-anna share of the village Bawanda was attached, along with some other property belonging to Saiyid Mahmud. During the pendency of the sale proceeding an application (Ex. 24) was made by Musammat Amina Bibi, wife of Saiyid Ali Zafar, alleging that she held a lease in perpetuity, granted to her by Saiyid Mahmud, on the 11th of April, 1913, and asking that the existence of that lease might be notified at the time of the sale. She, however, did not produce any evidence in support of her application, which was rejected on the 18th of September, 1915 (Ex. 25). The said property, along with other properties, was sold on the 20th and 21st of September, 1915, and purchased by the present plaintiffs, Saiyid Yusuf and

Saiyid Yamin, for Rs. 41,852, out of which Rs 17,850 were paid for the eight-anna share of taluqa Bawanda, including certain appurtenant villages.

On the 3rd of December, 1916, the auction-purchasers got possession; but when they applied for the mutation of names in the revenue papers, they were opposed by Musammat Amina Bibi, who claimed to be entitled to remain in possession of the disputed property as a perpetual lessee under the lease of the 11th of April, 1913 Her name had already been entered as a lessee. The Board of Revenue refused to expunge her name. The present suits were thereupon filed, in which the validity of that lease forms the main subject of contention One of the suits had been filed by Saiyid Yusuf and Saiyid Yamin, the auction-purchasers, the other by Musammat Maryam Bibi, who claims a 1/5th share in the property purchased at auction by the former She had filed a suit for a declaration of her title to a 1/5th share against her brothers and obtained a decree by compromise against them on the 26th of March, 1917

The allegation of the plaintiffs in these suits was that Saiyid Mahmud was mentally unsound and incapable of entering into a contract and that, in any event, the lease in question was unenforceable, because it was executed with the object of defrauding the present plaintiffs of the right to recover the dower debt due by him to their mother, Musammat Saleha Bibi. Among the defendants to these suits were Musammat Amina Bibi, her husband Saiyid Ali Zafar, and Gopal Das. Two other persons Jhagru Rai and Ganga Rai, were also impleaded on the ground that they had obtained a perpetual lease of certain plots of land situated in Bawanda khas from Musammat Amina Bibi and the other co-sharers of the village Saiyid Mahmud did not appear, but the other defendants controverted the allegations made by the plaintiffs. The finding of the learned Subordinate Judge was that Saiyid Mahmud was of weak intellect, imbecile and not possessed of the ordinary capability of managing his affairs. He did not consider that he was a lunatic, fit to be sent to an asylum, or an insane person dangerous to society; but he thought that his brain was so far deranged and he was so far incapable of managing his affairs as to render the lease granted by him legally unenforceable. He also found that the lease was granted with-

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out any necessity and for no real consideration, and that the rent reserved by the lease was grossly inadequate. One of the pleas raised by the defendants was that the claim for possession and mesne profits was not cognizable by the Civil Court. His finding on that point was against the defendants. Another plea was that the entire claim was barred by limitation, but on that point too the learned Subordinate Judge found against them.

The present appeals have been directed against these findings. The first question for consideration is whether Saiyid Mahmud was of unsound mind at the time he executed the lease in question, and incapable of understanding the nature of the transaction and of forming a rational judgment as to its effect upon his interests

[After discussing the evidence, their Lordships proceeded.]

All these circumstances confirm the view that the mind of Saiyid Mahmud was deranged and has been so for 15 or 16 years and that he was mentally unfit and incapable of understanding or realizing the effect of the transaction, which Saiyid Ali Zafar managed to secure from him for the benefit of his wife. The learned Subordinate Judge does not expressly say that the lease was void from its inception, but in view of section 12 of the Indian Contract Act the only conclusion we can come to is that the lease was void for want of competency to contract, due to the unsoundness of mind of Saiyid Mahmud, from its very inception.

Assuming for the sake of argument that the lease in question was executed while Saiyid Mahmud was in a lucid moment, the plaintiffs would still be entitled to avoid the lease, because the object of the execution of that lease was to defraud the plaintiffs of the dower debt, to which they were entitled as the heirs of Musammat Saleha Bibi the wife of Saiyid Mahmud. There is evidence to show that Saiyid Mahmud was aware that a suit for the recovery of that dower debt was going to be filed.

[Their Lordships, after discussing the facts, continued.]

It is immaterial whether Musammat Amina Bibi shared that intention, for even if she did not do so, the fact that the lease was granted to her in perpetuity without any consideration, on a low rent, is sufficient to justify a presumption that she colluded with her husband, Ali Zafar, and Saiyid Mahmud

in obtaining the lease with the object above stated. The plaintiffs are entitled in the circumstances to avoid the lease.

It is next contended on behalf of the defendants (appellants) that a suit for possession of the disputed property and mesne profits was not maintainable in the Civil Court, and reliance is placed in support of that contention on the decisions in *Ram Singh* v. *Giraj Singh* (1) and *Sher Khan* v. *Debi Prasad* (2). In the former case a previous attempt had been made by a person who sought to set aside the lease, said to have been granted by his agent, to eject the lessee by means of a suit for ejectment in the Revenue Court. The existence of a tenancy was similarly admitted by the mortgagee and formally declared by the Revenue Court on a reference being directed by the Civil Court in a suit brought by the mortgagee for the ejectment of the person to whom the mortgagor had granted the lease. A reference has also been made to the decisions in *Badri* v. *Khurshed Ali Khan* (3) and *Jagannath* v. *Drigbijay Singh* (4). But in each of these cases the existence of a tenancy had previously been acknowledged or conceded. The plaintiffs here assert that the contesting defendants were trespassers, and that the lease set up by them was void and unenforceable. The tenancy set up by them was never acknowledged or conceded by the plaintiffs, and if the lease granted by Saiyid Mahmud was void or unenforceable, no tenancy can be deemed to have come into existence by virtue thereof. Subject to the provisions of section 202 of the Agra Tenancy Act (U. P. Act II of 1901), where a tenancy is denied by one party, the validity or otherwise of the document of title on which the other party bases his right can always be determined by the Civil Court.

In *Ali Jafar* v. *Phulmanta Kuer* (5) it was held that a Civil Court was competent to give a declaration as to the existence or non-existence of a tenancy, though it was not competent to determine the nature or class to which the tenant belonged. In *Raghunath* v. *Ganesh* (6) it was similarly held that a suit filed for the ejectment of a tenant on the

(1) (1914) I. L. R., 37 All., 41.
(2) (1915) I. L. R., 37 All., 254.
(3) (1917) 20 Oudh Cases, 182
(4) (1918) 21 Oudh Cases, 249
(5) (1915) 13 A. L. J., 843
(6) (1919) I. L. R., 42 All., 222.

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ground that he was a trespasser was cognizable by the Civil Court, though if the defendant set up a tenancy, the procedure laid down in section 202 of the Tenancy Act (II of 1901) would have to be followed in the absence of any previous determination of that matter by a competent court

In *Debi Bakhsh* v. *Ram Dhani* (1) it was similarly held that the Civil Court was competent to adjudicate upon the validity of a document of title, though it was not competent to declare the nature of the tenancy claimed by virtue of it.

In the present case the lease was void *ab initio* because Saiyid Mahmud was not competent to enter into a contract at the time the lease was granted. The position of a person holding under such a lease is that of a trespasser, and in the absence of any admission or adjudication as to the existence of a tenancy in any previous proceeding, the defendant must be held liable to ejectment by the Civil Court.

It is also urged on behalf of the defendants (appellants) that even if the lease of the 13th of April, 1913 was void, the defendants, Ali Zafar and Gopal Das could rely on the earlier lease of the 22nd of October, 1908, as establishing their title to the disputed land as tenants; but the term of that lease has expired, and any rights which might have accrued thereunder were released long ago The lease granted to Musammat Amina Bibi says so, and in a plaint filed by Saiyid Ali Zafar and Gopal Das against Baldeo Rai and others on the 9th of November, 1917 (Ex. 39), it was expressly admitted that the rights under that lease had been surrendered by the lessees when the lease now in question was executed. Ali Zafar and Gopal Das have not, moreover, appealed from the decree which had been passed against them for possession by the court below; and no such plea can, therefore, be entertained

Another argument urged on behalf of the defendants (appellants) is that the courts below have erred in not following the provisions of section 202 of the Agra Tenancy Act, requiring the defendants to have the question of their tenancy determined by the Revenue Court. That section states that if in any suit relating to an agricultural holding, instituted in the Civil Court, the defendant pleads that he holds such land as a tenant of the plaintiff or a person in possession of the holding from the plaintiff, the Civil Court shall by an order in writing require the defendant to institute within three months

(1) (1916) 19 Oudh Cases, 58.

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a suit in the Revenue Court for the determination of such a question. By section 3 of that Act "land" is defined as meaning land which is let or held for an agricultural purpose, and "holding" is defined as meaning a parcel or parcels of land held under one tenure or one lease or engagement. The lease in dispute was taken by Musammat Amina Bibi for the purpose of collection of rent. It comprised, among other things, the right to collect rent and certain zamindari dues. It was not a lease granted for agricultural purposes within the meaning of section 202; and, as held in *Rani Dhandei Kuar* v. *Chhotu Lal* (1), section 202 has no application. The lessee was a *thekadar* and may be considered to be a tenant, but the property comprised in the lease was not an agricultural holding and the suit was, therefore, not one relating to an agricultural holding so as to make that section applicable

No question of limitation arises, because the lease was void from its very inception. The claim for possession is within time.

It only remains to consider the claim set up by Jhagru Rai and Ganga Rai on the strength of the lease in perpetuity of 15 bighas of land granted to them by the co-sharers of a 9 annas 8 pies share, and by Musammat Amina Bibi as a lessee of the remainder, on the 16th of July, 1914. The learned counsel who appears for the plaintiffs (respondents) states that the rights of the persons in possession need not be disturbed if those rights can be enforced against the shares of the lessors who own the remaining shares in the village The plaintiffs have no right to disturb their possession so far as they hold under other co-sharers, but these defendants have no right to hold possession under Musammat Amina Bibi.

We dismiss the appeal accordingly, subject to the reservation that the rights of Jhagru Rai and Ganga Rai under the lease granted to them by certain co-sharers jointly with Musammat Amina Bibi on the 16th of July, 1914, will not be affected, except in so far as that lease was granted to them by Musammat Amina Bibi, nor will they be liable to ejectment in pursuance of this decree unless the land comprised in their lease is allotted by partition to the share of the plaintiffs. The plaintiffs (respondents) will get their costs from

(1) (1921) 19 A L J . 890

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the defendants (appellants). The defendants (appellants) will bear their own costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

1922 *June*, 14.

PIARI LAL AND OTHERS (DEFENDANTS) v. SUNDAR SINGH AND OTHERS (PLAINTIFFS) AND CHHEDA LAL AND OTHERS (DEFENDANTS) *

Hindu Law—Joint Hindu family—Dispute as to alienation of family property—Burden of proof

Although in the case of a disputed alienation or mortgage of joint family property by the father or *karta* of the family the burden of proving the legality of the transaction rests primarily on the creditor, yet in the case of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and in the absence of evidence tending to shake confidence in the transactions themselves or in the conduct and care of the manager or of the creditor, the burden is shifted back on to the sons or members of the family who desire to repudiate them. *Banga Chandra Dhar Biswas* v. *Janat Kishore Acharjya Chowdhuri* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court

Dr *Surendra Nath Sen*, for the appellants.

The Hon'ble *Syed Raza Ali*, for the respondents

WALSH and RYVES, JJ.:—In our view this appeal fails. It raises in form a nice question of onus in a case where the law has uncontrovertibly placed the onus of proof to support a mortgage of family property upon the shoulders of the creditor. It is sufficient for the purpose of the preceding statement to refer to the judgment of SIR JOHN STANLEY in the case of *Chandradeo Singh* v. *Mata Prasad* (2), which has received the expressed approval and adoption, if one may use the term of the Privy Council, more than once, and particularly in the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), and we of course faithfully adhere to that decision, which may be said to have a force in India equivalent to statute law

We adopt also the principle laid down by the Privy Council, as expressed in the concluding words of the opinion of their Lordships delivered by LORD SHAW in the case of *Sahu Ram Chandra* v. *Bhup Singh* (3), where he says that in order to validate a transaction of mortgage of family property by the father or manager there must be not only formal antecedency, but antecedency in date combined with real dissocia-

* First Appeal No. 195 of 1920, from a decree of Hanuman Prasad Varma, Subordinate Judge of Budaun, dated the 31st of March, 1920.

(1) (1910) I. L. R., 64 Calc., 186; L. R., 43 I. A., 249.

(2) (1909) I. L. R., 31 All., 176.

(3) (1917) I. L. R., 39 All., 437.

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tion in fact. The courts in India are warned not to give effect to mortgages brought into existence merely to cover a breach of trust and what is called an unreal antecedency.

But the question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains, in the decision of each particular case, as to whether, having regard to the transactions which have been established by evidence, the onus still remains where it was, or whether, on the other hand, it has been made to shift, and one might cite, if any useful purpose would be served by citing them, cases in which the onus has been shifted several times during the process of elucidating a case, in consonance throughout with the general principle of law governing the question of onus in such circumstances. So that, in each particular case, whether the onus has been shifted or not becomes a mixed question of fact and law, or rather a question of the due application of a recognized principle to the shifting scenes and circumstances of the countless varieties of human life in business. An illustration of the way in which the onus may be totally shifted without any express evidence beyond what may be afforded by the documents or the admitted circumstances of the case, which are common ground to both parties, is to be found in the case of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1), where ancient documents affecting an alienation by Hindu widows, which would *a priori* be totally contrary to law and which contain mere recitals of necessity which prove nothing except that the parties to the deeds were anxious to make other people believe that there had been necessity, and the admitted circumstances in which such deeds had been entered into, were held sufficient as a matter of fact and common sense to shift the onus, and in the absence of anything to the contrary, to justify the findings of fact sufficient to support the documents. In this case we have (we do not propose to enter into a detailed history of the transaction), broadly speaking, a document which is sued upon in 1918, dated 1906, in respect of which the creditor has succeeded in showing a sum roughly of Rs. 3,071 to have been made up of various liabilities, not in themselves open to objection, except two earlier mortgage bond liabilities dated, respectively, 1898 and 1899. It is in respect of these two mortgage bond liabilities that Dr. Sen in his able argument has seriously

(1) (1916) I. L. R., 44 Calc., 126; L. R., 43 I. A., 239.

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challenged the view taken by the learned Judge. On the question of legal necessity these two documents are silent. They do no more than reopen previous liabilities traceable to four prior transactions, two of which had occurred in 1892 and two in 1897, which are brought forward and reaffirmed as existing liabilities and discharged by the fresh contracts made in 1897 and 1899. These prior transactions are not on the record. Both parties were either content, or compelled, to rest upon the state of the evidence without the assistance of these documents, and to rely upon such inferences as the court could legitimately draw from the evidence in such condition. There is nothing to show us, and it by no means follows from one's experience of these and other instances, that, if these documents had been brought upon the record, they would not again have opened out a fresh vista of prior transactions of business loans brought forward and reaffirmed by them, and throwing the parties back another stage in the history of this family's borrowings. As a matter of business and common sense which are really matters of fact, we decline to take judicial notice of the fact that fathers of joint Hindu families, or managers or *kartas* as the case may be where the father is dead, are necessarily and chiefly occupied in going out of their way to borrow money for purposes which they know to be unlawful and which can confer no benefit upon the general body of the family to which they belong and of which they are the respected heads. On the contrary, the presumption must be in their favour, *viz*, that inasmuch as their own interests are indissolubly interwoven with the interests, and one may say also the affections, of the other members of the family, it is after all not paying a very high compliment to their character and natural inclination, to presume, unless there is something to arouse suspicion in the evidence of the case, that the object of going through all this trouble of raising loans is to assist and benefit the joint family. The learned Judge in this case has contented himself with finding that the Rs 3,000 was borrowed for legal necessity, to pay antecedent debts and for family expenses and that, therefore, to that extent the sons were bound by the mortgage, and nobody can doubt, to apply LORD SHAW'S language, that the transactions of 1898 and 1899 were really antecedent and dissociated in fact. The opinion of the Privy Council as expressed by LORD BUCKMASTER in the case of *Banga Chandra Dhur Biswas* v *Jagat Kishore Acharyya Chowdhuri* (1) seems

(1) (1916) I. L. R., 44 Calc., 186: L. R., 43 I. A., 249.

to us to be peculiarly appropriate. To hold otherwise, that is to say, to hold in cases of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and to destroy the liability if such evidence is not forthcoming, would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time.

We are prepared to hold in this and similar cases that, in the absence of evidence tending to shake confidence in the transactions themselves, or in the conduct and care of the manager or of the creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions. We might add to the observations of LORD BUCKMASTER that to hold otherwise is to hold out to litigants the deliberate invitation, one might use the word temptation, to attempt to conform to an impossible standard of evidence by calling direct testimony which must of necessity be valueless and frequently deliberately perjured. There is enough of this sort of thing in the trial courts, as it is, without any further encouragement being given to it by us. Taking a broad view, although there are exceptions to every rule, we ourselves are not prepared to call upon the creditor to trace every rupee in a transaction which, broadly speaking, is obviously honest and properly entered into. We think that the creditor has done all that he was required to do by the decisions of the Privy Council in this matter, that the learned Judge has come to a right conclusion, and that this appeal must be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Piggott.

EMPEROR v. KHIALI AND ANOTHER *

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June, 16.

Criminal Procedure Code, section 421—Appeal—Petition from jail rejected—Petition presented thereafter through counsel not entertainable.

Where a petition of appeal submitted through the Superintendent of the jail in which the appellant is confined has been considered and rejected by a Judge of the High Court, it is not open to the appellant thereafter to present through counsel a second petition of appeal. *Queen-Empress* v. *Bhimappa* (1) referred to. *Hulat* v. *Emperor* (2) not followed.

* Criminal Appeal No. 303 of 1922, from an order of Pratap Singh, Additional Sessions Judge of Aligarh, dated the 4th of April, 1922.

(1) (1894) I. L. R., 19 Bom., 732

(2) (1915) 36 Indian Cases, 133

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THE facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the appellants.

The Government Pleader (Munshi *Saukar Sarai*), for the Crown.

MEARS, C. J. and PIGGOTT, J. —On the 4th of April, 1922, the court of the Additional Sessions Judge at Aligarh, sitting at Etah, convicted two men, Khiali and Hulasi, on a charge under section 395 of the Indian Penal Code, and passed upon them substantial sentences of imprisonment and fines. On the 12th of April, 1922, both Khiali and Hulasi caused to be prepared in the jail in which they were confined petitions of appeal against their convictions and the sentences passed upon them. Those petitions of appeal reached this Court on the 15th of April, 1922. Having been examined and reported upon by a ministerial officer of this Court, they were laid before a Judge of this Court on the 20th of April, 1922. On the day following, the Judge in question, dealing with the petitions of appeal under section 421 of the Code of Criminal Procedure, dismissed both the appeals of Khiali and Hulasi summarily.

On the 1st of May, 1922, counsel having been instructed on behalf of Khiali and Hulasi, brought for presentation to this Court a petition of appeal, which was submitted to a ministerial officer of this Court for report. In the report thereupon prepared, attention was drawn to the fact that petitions of appeal from Khiali and Hulasi had been received through the Superintendent of the Jail, and summarily dismissed by a Judge of this Court. Counsel for Khiali and Hulasi seems to have taken a little time to consider his position, but finally presented a fresh petition of appeal on the 8th of May, 1922. The Judge, before whom this petition was presented, passed an order, dated the 10th of May, 1922, in which he referred to a previous decision of this Court and directed that the petition of appeal should be laid before a Bench of two Judges for consideration.

We are asked expressly to determine the question whether this second petition of appeal, on behalf of Khiali and Hulasi, is entertainable in view of the order of the 21st of April, 1922, summarily dismissing the petitions of appeal received through the Superintendent of the Jail.

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The earlier case of this Court is that of *Emperor* v. *Bhaiaru Dhal* (1). The facts of that case are clearly distinguishable from those now before us. A petition of appeal had been received by a Sessions Judge, through the Superintendent of the Jail in which the appellant was confined, and while that petition was still pending and undisposed of in the Sessions Court, the same appellant presented a second petition of appeal through counsel. Apparently, overlooking this fact, the Sessions Judge, first of all, summarily dismissed the petition which had been received through the Superintendent of the Jail, and then proceeded further, on the strength of this order, to dismiss the petition filed through counsel, without having even offered the counsel concerned an opportunity of arguing the same. A learned Judge of this Court held that this procedure was illegal and, setting aside the order of dismissal, directed the Sessions Judge to readmit the appeal of that particular convict and to dispose of it according to law after hearing counsel. The point of that decision obviously is that, when once a petition of appeal has been filed through counsel under section 419 of the Code of Criminal Procedure, it is improper to dismiss the appeal summarily at all, and an order summarily dismissing an appeal while there is a petition presented through counsel pending and undisposed of on the file of the Court, would be nonetheless an improper order, because it happened that another petition of appeal in the same matter from the same convict had been received through the Superintendent of the Jail. In the case now before us, the order summarily dismissing the petitions of appeal presented on behalf of Khiali and Hulasi through the Superintendent of the Jail in which they were confined was a valid and proper order, there being on the file of this Court on that day no petition of appeal other than the two petitions received through the Superintendent of the Jail. The right of appeal allowed to Khiali and Hulasi against their conviction by the Sessions Judge and sentences passed upon them has, therefore, been fully exercised according to law, and their appeals have been disposed of by a proper and valid order of this Court, before the petition of appeal with which we are now dealing was ever presented to the Court at all. The objection is not to the presentation of more than one petition of appeal by or on

(1) Weekly Notes, 1906, p. 203

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behalf of the same convict, but to the obtaining from this Court of more than one judicial determination upon the question raised by the appeal. In our opinion this application is not entertainable.

We have been referred in argument to one case, which has not found its way into any of the authorized reports, but which certainly is an authority in favour of these appellants. The case is that of *Hulai* v. *Emperor* (1). In that case Mr. Justice LINDSAY, then Judicial Commissioner of Oudh, had before him the order of a Sessions Judge dismissing an appeal which had been presented through counsel, on the ground that a previous petition of appeal in the same matter received through the Superintendent of the Jail had been summarily dismissed Mr LINDSAY set aside the order of the Sessions Judge for reasons stated in the report. He there refers to the case of *Emperor* v. *Bhawani Dihal* (2), but does not note the distinction in the facts to which we have referred. As regards the reference which Mr. LINDSAY makes to his recollection of a previous decision of the same Court, we believe the facts to be that the learned Judge of the Oudh Court, who had previously summarily dismissed an appeal, found it possible under the circumstances to review and set aside his own order, before the appeal presented through counsel was heard or permitted to be argued. There is no such question arising in the present case and we need not consider under what circumstances, if any, it would be possible for a Judge of this Court to reconsider a final judgment of his own, delivered in a criminal matter. There is one case in the authorized Law Reports which is entirely in accordance with the view which we ourselves are disposed to take, and that is the case of *Queen-Empress* v. *Bhimappa* (3). It was there distinctly held that an order dismissing an appeal, under section 421 of the Code of Criminal Procedure, was a final order, not open to review by the Court which passed the same, and that a Sessions Judge had acted without jurisdiction when, having reconsidered a question of limitation he proceeded to hear and decide in a different sense an appeal which he had previously dismissed. In our opinion the appellants, Khiali and Hulasi, are not entitled to be heard upon a petition of appeal presented after their original petitions of

(1) (1915) 36 Indian Cases, 133
(2) Weekly Notes, 1906, p. 303.
(3) (1894) I. L. R., 19 Bom., 732.

appeal, received through the Superintendent of the Jail, had been finally disposed of according to law by the order of a Judge of this Court. We reject this petition of appeal accordingly.

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Appeal rejected.

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Kanhaiya Lal

1922 *June*, 21.

SRI GANGAJI COTTON MILLS COMPANY LD (PLAINTIFFS) *v* EAST INDIAN RAILWAY COMPANY (DEFENDANTS).*

Railway—Suit for compensation in respect of goods damaged in transit—Suit brought against one company only out of several over whose lines the goods passed—Offer of compensation made unconditionally by one of the railway companies concerned—Refusal to take delivery on refusal of railway to record damaged condition—Right of sale of goods thereafter.

Certain bales of cotton were despatched from Jaipur to Mirzapur, where they arrived in a more or less damaged condition. In the course of transit the goods passed over parts of four separate railway systems. On the arrival of the goods at Mirzapur, the consignees demanded that the local railway (East Indian Railway) officials should make a record of their condition, and on these officials refusing to do so, declined to take delivery. The question of the amount of damage was inquired into by certain of the higher railway officials and the consignees were offered compensation, first at the rate of Rs 10 and afterwards at the rate of Rs 20 per bale. The consignees refused to accept either offer and refused to remove the goods, and these were ultimately sold by the Railway authorities. The consignees then sued the East Indian Railway Company alone, claiming heavy damages on account of the alleged illegal sale of their property and also on account of injury to the same as above described.

Held (1) that the defendants were acting within their rights in selling the goods when the consignees would not take delivery, and (2) that, although the plaintiffs would not ordinarily be entitled to a decree against the defendants, who were not the railway company to whom the goods were delivered by the consignor, unless they could show that the goods suffered damage whilst in their custody, on the other hand the defendants had not, in offering to compensate the plaintiffs, protected themselves by making their offers "without prejudice," and they must therefore be held liable to the extent of the higher offer made.

But, in view of their conduct throughout, the plaintiffs were directed to pay the whole costs of the defendants.

The facts of this case fully appear from the judgment of LINDSAY, J.

LINDSAY, J. :—The suit which has given rise to this appeal was brought against the East Indian Railway Company by the Sri Gangaji Cotton Mills Company Limited, carrying on business at Mirzapur, and the claim was for Rs. 23,980-3-6 plus interest at Rs. 6 per cent. per annum, making a total of Rs. 25,363-6-6.

* First Appeal No 111 of 1920, from a decree of Man Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 31st of January, 1920

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SRI GANGAJI COTTON MILLS COMPANY LD v. EAST INDIAN RAILWAY COMPANY.

The suit has been dismissed *in toto* by the Subordinate Judge and the plaintiff company appeals

The facts of the case are that in May, 1918, a consignment of 108 bales of cotton was booked at Jaipur, on the Bombay, Baroda and Central India Railway, for delivery to the plaintiff company at Mirzapur. A portion of this consignment, consisting of 54 bales, was delivered to the plaintiff company at Mirzapur on the 22nd of May, 1918.

On that date, it appears, the plaintiffs handed over to the East Indian Railway the railway receipt for the entire consignment of 108 bales, and paid the full freight due, amounting to Rs 437-1-0.

The rest of the consignment, 54 bales, was delayed in transit and did not arrive at Mirzapur till the 2nd of July, 1918, on which date notice of arrival was given to the plaintiffs. The latter, after some inspection of the goods on the railway premises, objected to take delivery on the ground that the bales were damaged, and on the 3rd of July they sent a letter (Ex. Q.) They asked the Goods Clerk to keep the goods at the railway goods shed pending inspection by a railway officer. A telegram to the same effect was sent to the District Traffic Manager at Cawnpore on the same date and this was confirmed by letter (Exs 10 and 22 respectively).

In this letter they informed the District Traffic Manager that from outward appearance it seemed that the bales had been neglected and exposed to rain and that each bale had been more or less damaged. Plaintiffs said they wanted inspection before taking delivery.

The Railway Company agreed to have an inspection made, and this was carried out on the 21st of July by a Traffic Inspector, Mr. Robinson. It is not denied that Robinson, after inspection, offered the plaintiffs Rs. 10 per bale by way of compensation, an offer which the plaintiffs rejected as inadequate [see their letter to the District Traffic Manager, dated the 30th of July, 1918 (Ex 11)]

The plaintiffs pressed their claim for compensation at a higher rate and the Railway Company then deputed an Assistant Traffic Manager, Mr. Dyer, who examined the goods on the 9th of August, 1918, and made an offer of compensation at the rate of Rs. 20 per bale. This second offer the plaintiffs also refused by their letter of the 9th of August (Ex 4) The plaintiffs in that letter said they were willing to accept Rs. 30

per bale and would take delivery if damages were paid at that rate. The Railway Company then arranged with the Upper India Chamber of Commerce for inspection by an expert, Mr. Vernon, the Superintendent of the Elgin Mills at Cawnpore. He proceeded to Mirzapur and examined the goods on the morning of the 18th of August. No representative of the plaintiffs was present at this inspection though notice had reached the plaintiffs on the evening of the 17th of August.

Vernon, who has been examined as a witness in the case, reported that the damage was insignificant, that 48 out of the 54 bales were in good condition and that 6 bales were slightly damaged. He estimated the damage at 10 lb. of cotton per damaged bale and recommended compensation on this scale.

There is no evidence on the record to show that this report was actually communicated to the plaintiffs, though it was stated in para 34 of the defendant's written statement that an offer in accordance with Vernon's report was made to the plaintiffs on the 7th of September which was refused. The matter is not of much importance for, as the plaintiffs had already refused compensation at Rs. 20 per bale, it can hardly be imagined that they would have been willing to accept the much lower rate of damages which Vernon had assessed.

The next thing we find is that on the 9th of September, 1918, the plaintiffs sent in a claim to the Agent of the Railway in a letter (Ex. 14). They demanded the cost of the 54 bales at the rate of Rs. 80 a maund, a total of Rs. 20,837. To this was added a claim for Rs. 2,025 for damages caused by the delay in delivery, which had led to the closing down of the plaintiffs' mills on account of shortage of cotton. This claim, it may be observed, was the reiteration of a claim put forward on the 28th of June, 1918, and related to the delay which had taken place in the carriage of the goods prior to the 2nd of July, 1918. The third item of the claim made on the 9th of September, 1918, was for Rs. 218-8-6, this being one-half the freight of the whole consignment. The plaintiffs had paid the whole sum due for freight on the 22nd of May.

It is evident from the language of this letter of the 9th of September that the plaintiffs had made up their minds to claim compensation on a scale they had not hitherto contemplated; in fact they were advancing a claim for the total loss of the goods. We find them stating that the goods had been seriously neglected, that "they had been lying in the open, rain water

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SRI GANGAJI COTTON MILLS COMPANY LD. v. EAST INDIAN RAILWAY COMPANY.

pouring upon them freely for months and weeks together." The plaintiffs further stated that after "minute examination of the stuff" they had arrived at the conclusion that the quality of the cotton had become seriously deteriorated.

It does not appear when this "minute observation" was made, and it seems rather to be the fact that no such examination was ever made by the plaintiffs.

The Agent of the Railway acknowledged receipt of this claim and promised inquiry, and, thereafter, a good deal of correspondence passed between the parties without any settlement being arrived at.

On the 9th of November, 1918, the Railway Company served a notice on the plaintiffs to say that if the goods were not removed by a date mentioned in the notice, they would be sold at the plaintiffs' risk The plaintiffs refused to comply with this notice, and eventually the Railway sold the goods at the rate of Rs. 117 per bale. At the hearing of the appeal we were told by the counsel for the Railway Company that this sale took place in March, 1919, and this, no doubt, is correct.

The correspondence between the parties closed with a letter from the Agent to the Railway to the plaintiffs, dated the 28th of April, 1919. The Railway Company refused to consent to further arbitration and offered payment to the plaintiffs of the sale-proceeds of the goods less any amount due to the Railway.

The plaintiffs filed their suit on the 18th of June, 1919; and this, as has been said, has been dismissed by the court below.

In substance the findings of the Subordinate Judge are that the plaintiffs had no right to recover and that the Railway Company was justified in selling the goods. The court held that the plaintiffs were in default, that they had wrongfully refused delivery, and that it had exercised its statutory right to sell the goods in accordance with law.

The Subordinate Judge was also of opinion that the plaintiffs had no right to compensation for damage to the goods as the plaintiffs had failed to prove that any damage took place on the defendant company's line, and had omitted to sue the Bombay, Baroda and Central India Railway Company, to which the goods had been made over by the consignor.

He also held that the item of Rs. 2,925 claimed by the plaintiffs on account of damages resulting from the closing of

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their mills by reason of the delay in the carriage of the second instalment of the goods could not be awarded, as this was a false claim on the part of the plaintiffs.

It may be observed here that this portion of the claim is no longer pressed, nor indeed could it be, for the Railway Company, defendant, was able to establish conclusively in the court below that if the plaintiffs' mills were closed down, the reason was that there was a shortage of coal and not because of any delay in the transit of the bales of cotton.

To come now to the appeal, it is complained that the court below did not rightly appreciate the nature of the plaintiffs' claim which, it is said, was in reality a claim based upon the wrongful conversion of the plaintiffs' goods by the defendant Railway Company.

Speaking for myself, I do not see that the Judge of the court below was under any misapprehension regarding the nature of the case which the plaintiffs set up, though considering the manner in which the case was set out in the plaint, he might, with some excuse, have been led into doubt.

He has, however, in my opinion, dealt with the case on the right lines as a whole and has definitely found that the Railway Company was justified in selling the plaintiffs' goods in exercise of the power conferred by section 56 of the Indian Railways Act (IX of 1890) which authorizes a railway administration, in certain circumstances and on certain conditions, to sell unclaimed goods.

In this connection the whole question is whether the Railway was in the circumstances entitled to treat the 54 bales of cotton as unclaimed goods.

The argument urged for the plaintiffs, in substance, is that it was not so entitled It is contended that in the first instance the Railway Company wrongfully put obstructions in the way of the plaintiffs' taking delivery, and it is further argued that because the plaintiffs had put in a claim for damages, the Company had no right to sell pending a settlement of the claim. In my opinion neither of these arguments can be accepted.

To take first the plea that the Railway Company obstructed taking of delivery. What is the case of the plaintiff company on this point?

It is set out in paragraphs 7 and 8 of the plaint, where it is alleged that the plaintiffs sent their men to the railway

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station and discovered that the bales were wet and damaged, and that thereupon the plaintiff company "refused to take delivery without an inspection and a note as to the condition of the goods by the defendant company's servants at the Mirzapur station which they refused to do." If this means that the inspection referred to was inspection by the plaintiffs themselves, then the allegation is not true, for it is clear on all hands that the plaintiffs had ample opportunity to inspect the goods and did as a matter of fact inspect them. On the other hand, if it means that the inspection was to be inspection by the Railway Company, then the answer to the plaintiffs' case is that they had no right to insist upon an examination of the goods by the defendant Railway. There seems to have been some argument in the court below about the right to what is called "open inspection" and the Subordinate Judge seems to have thought that the plaintiffs were insisting upon one such right, though that is denied in the 3rd paragraph of the memorandum of appeal.

It has been definitely settled in this Court that a consignee has no right to demand that the goods shall be opened and inspected on the Railway premises before he can be called upon to take delivery: *Jwala Prasad & Co.* v. *Great Indian Peninsula Railway* (1).

But it is argued (see the plea in the 12th paragraph of the memorandum of appeal) that the plaintiffs had a right to have a note made in the Railway Company's delivery register, recording that the goods were in a damaged condition and that if the company's servants refused to make such an entry or allow such an entry to be made, there was an obstruction amounting to wrongful refusal to deliver. Much stress has been laid upon the fact that the plaintiffs had handed over the railway receipt to the defendant company before the second lot of bales arrived and it is said that if the plaintiffs had signed the delivery register without recording that the goods were damaged, they would have been precluded thereafter from claiming damages, on the ground that they had given a clear receipt. This argument does not appeal to me. In the first place, I have not been shown any provision of law or any statutory rule which obliges a Railway Company to make or to allow to be made in its delivery register any note alleging that goods are in a damaged condition. In the next place, it has

(1) (1913) 11 A L J, 772.

been definitely decided by a Bench of this Court that the plaintiff cannot refuse to take delivery because the Railway Company refuses to make an entry in their books. There the plaintiff's case was that there was a shortage in the weight of the goods. The Bench held that the plaintiff could not insist upon an entry. If he had any complaint, he was entitled to make his representation to the company in any other way: *Koka Mal* v. *Great Indian Peninsula Railway* (1). And, lastly, it is not correct to say that the plaintiffs would have been barred from a suit if they had signed the delivery register so as to constitute what is called a "clear receipt"; *East Indian Railway Company* v *Sispal Lal* (2).

I am satisfied, therefore, that the plaintiffs cannot maintain that anything done by the defendant Railway's servants on the 2nd of July, 1918, amounted to a wrongful refusal to deliver the goods.

As for anything which happened after that date, I can find no evidence of wrongful retention of the goods by the defendant Railway. It is true they kept the goods in their custody, but that was at the plaintiffs' own request. The Railway Company, in order to satisfy the plaintiffs, consented to have the goods inspected by their own officers and by Mr. Vernon, but the plaintiffs cannot be heard to say that this was, in any way, a wrongful act on the part of the Railway Company. After the inspections had been made and compensation had been offered to the plaintiffs, it was their duty to remove their goods and no hindrance to removal was placed in their way.

The argument put forward on behalf of the plaintiffs seems to imply that they had a right to call upon the Railway Company to warehouse their goods until such time as the company was prepared to offer them damages which they would accept. There is, in my opinion, no warrant for such a proposition, and it may be added that even if there were, the plaintiffs abandoned the position completely when they wrote to the Agent, on the 9th of September, 1918, claiming not damages but the full price of the goods.

I hold, therefore, that the suit for damages for wrongful conversion fails and that the decision of the court below on this point is correct. The only question which remains to be

(1) (1913) 11 A. L. J., 775
(2) (1911) I. L. R., 39 Calc., 311.

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considered is whether the plaintiffs should be awarded any compensation for damage to the goods.

That the goods were damaged there is no reason to doubt. On the other hand, it is clear that the damage was inconsiderable and that the claim put forward by the plaintiffs is grossly exaggerated. This is apparent from the fact that they were willing to accept compensation at the rate of Rs. 30 per bale.

In dealing with this matter it has to be borne in mind that the goods were carried over the systems of several railways. They were made over at Jaipur to the Bombay, Baroda and Central India Railway and they travelled first over the line under that Railway's control, then over the lines of the Bengal North-Western Railway and of the Oudh and Rohilkhand Railway before they came upon the line of the defendant company at Mogal Sarai which is only a short distance from Mirzapur.

The Bombay, Baroda and Central India Railway Company, with which the goods were booked, is no party to the suit, nor has any other of the above-named administrations been impleaded as defendant. The sole defendant is the East Indian Railway Company.

In these circumstances the plaintiffs could only recover damages from the East Indian Railway Company by proving that the damage was caused on its system This is clear from the provisions of section 80 of the Indian Railways Act (IX of 1890) and the law has been so interpreted in the case of *Great Indian Peninsula Railway* v. *Shum Manohar* (1).

The plaintiffs have not produced any direct evidence to show that the defendant Railway Company is responsible for the damage to their goods.

The only evidence which has any bearing on this question is the statement of Krishna Gopal Das, a witness called for the defendant. He is a clerk on the Oudh and Rohilkhand Railway and deposes that the 54 bales were received at Benares Cantonment station on the 26th of June, 1918, from the North-Western Railway (a metre-gauge line) and were transhipped the same day into a waggon on the broad-gauge system of the Oudh and Rohilkhand Railway for despatch to Mirzapur *viâ* Mogal Sarai. He deposes that the bales were in good condition at the time of transhipment and that they were placed in a sealed waggon.

(1) (1912) I. L. R., 34 All., 423.

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If this statement be true, then all that can be said is that any damage which was caused to the goods must have been caused between the 26th of June and the 2nd of July, 1918, either on the Oudh and Rohilkhand Railway system or on the system of the defendant company. That evidence would not suffice to fasten liability upon the East Indian Railway Company. Apart from this, there remains only the fact that the defendant company did, on three occasions subsequent to the 2nd of July, 1918, offer compensation to the plaintiffs. I have stated above that Rs. 10 per bale was offered by Robinson, one of the defendant company's inspectors. Later on, another employee of the defendant Railway, Mr. Dyer, offered Rs. 20 per bale, and, lastly, there was the very much reduced offer made after the inspection by Mr. Vernon on the 18th of August.

The question is whether these offers constitute an acknowledgment of liability on the part of the Railway Company which would justify an award of damages.

In paragraph 9 of the written statement the plea of the defendant company is that these offers were made in order to lead to a settlement out of court, but neither Robinson nor Dyer has been examined; so it is not possible to say whether the offers were made "without prejudice," nor have we been referred to any documentary evidence on the point I have considered this point carefully and am disposed to hold that the Railway Company has acknowledged liability.

As to the amount of damages I think a fair sum is at the rate of Rs 20 per bale offered by Dyer. It is true that the expert evidence of Mr. Vernon would, if accepted, show that this offer was in excess of what was really claimable. But Vernon's inspection was not made till the 18th of August, more than six weeks after the goods had arrived at Mirzapur—a fact which must be taken into account when estimating the value of his report.

I would, therefore, allow the plaintiffs damages to the extent of Rs. 1,080. The plaintiffs are not entitled to return of the freight, for the goods were carried to their destination. They are entitled to the sale-proceeds of the goods at the rate of Rs. 117 per bale.

There should, therefore, be judgment for Rs. 7,398 in all, but the plaintiffs having been in the wrong throughout, must be made to pay the defendant company's costs in both courts.

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Allowing the appeal in part, I would substitute for the decree of the court below a decree for Rs. 7,398 and direct that the plaintiffs do pay the costs of the defendant company in both courts.

KANHAIYA LAL, J.:—I agree in the order proposed.

BY THE COURT.—The appeal is allowed. A decree for Rs. 7,398 will be prepared in favour of the plaintiff company. The plaintiff company will pay the costs of the East Indian Railway Company in both courts.

Appeal decreed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott

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June, 21.

MAHADEO PRASAD AND OTHERS (DEFENDANTS) v. DHIRAJ SINGH (PLAINTIFF).*

Mortgage by conditional sale—Interest—No specific provision for post diem *interest—Right of mortgagee to claim interest* post diem, *at contractual rate.*

A mortgage by conditional sale provided for the payment of the mortgage money on a certain specified date. It also provided for the rate of interest which the mortgage money was to bear. But there was no separate provision as to interest *post diem*.

Held, on suit for foreclosure brought some years after the expiry of the term of the mortgage, that the mortgagee was entitled to claim interest at the rate stipulated for in the bond up to the date of suit. *Mathura Das* v. *Raja Narindra Bahadur* (1), *Bindeswri Naik* v. *Ganga Saran Sahu* (2) and *Sarala Dasi* v. *Jogendra Narayan Basu* (3) referred to.

THIS was a suit for foreclosure of a mortgage by conditional sale

The main question in the suit was whether the plaintiff was entitled to get *post diem* interest, and, if so, whether at the rate stipulated for in the bond or any other. The court of first instance held that the plaintiff was entitled to interest up to the date of payment at the contractual rate, even though there was no express provision for this in the bond, and decreed accordingly.

The defendants appealed

Dr. *Surendra Nath Sen*, for the appellants, contended that the plaintiff was not entitled to charge compound interest after the date fixed for payment. He further contended that if the plaintiff be held entitled to such interest by way of damages after the date fixed for payment of the mortgage, the claim would be barred by limitation. He commented upon

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* First Appeal No. 165 of 1920, from a decree of Lakshmi Narain, Additional Subordinate Judge of Cawnpore, dated the 28th of February, 1920.

(1) (1896) I. L. R., 19 All., 39.
(2) (1897) I. L. R., 20 All., 171.
(3) (1897) I. L. R., 25 Calc., 246.

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the case of *Mathura Das* v. *Raja Narindra Bahadur* (1). He referred also to the case of *Chajmal Das* v. *Brij Bhukan Lal* (2) which, he submitted, governed the case.

Munshi *Girdhari Lal Agarwala* (with Mr. *B. E. O'Conor*), for the respondent, cited the following cases in support of the judgment of the Subordinate Judge :—

Sarda Dasi v. *Jogendra Narain* (3) and *Bindesri* v. *Ganga Saran Sahu* (4); and contended that there were no words in the document which confined the running of interest to the period of five years.

Dr. *Surendra Nath Sen* was heard in reply.

MEARS, C. J., and PIGGOTT, J. :—The question which is in controversy between the parties in this appeal is whether in a mortgage by way of conditional sale the mortgagor is bound to pay interest at the agreed rate from and after the day upon which he should have discharged his obligations under the deed. In other words, is interest during the *post diem* period, though not expressly provided for, to be calculated under the particular provisions of the deed at the same rate as that stipulated for during the agreed period of the currency of the bond?

The position very shortly is as follows.—The borrower should have repaid, but did not repay, the principal and interest in December, 1907, and though certain payments of interest were made, the account at the commencement of this action on the 20th of October, 1919, showed that Rs. 8,000 principal and Rs. 10,581 interest were due. This was based upon the calculation that the express stipulation as to interest covered the whole period from the 8th of December, 1902, down to the date of the institution of the suit. Whilst it is of course proper that we should refer to and pay regard to decided cases, the main and important matters for our consideration are the exact terms of the document itself. When those have been considered, it is proper to see whether there are any decided cases so similar in their terms that the canons of construction that have been used by other courts will be of assistance to us. If so, it is our duty to avail ourselves of them.

The document, dated the 8th of December, 1902, was executed by Mathura Prasad, who was the father of the defendants (appellants). It stated that he had for a period of five

(1) (1896) I. L. R., 19 All., 89.
(2) (1895) I. L. R., 17 All., 511.
(3) (1897) I. L. R., 25 Calc., 246 (248).
(4) (1897) I. L. R., 20 All., 171 (180).

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years mortgaged without possession a certain property in lieu of Rs. 8,000 to Raja Dhiraj Singh, that the money was to be applied in satisfaction of a decree, and then follow the words which have given rise to this question :—

> It is covenanted that I shall continue to pay interest at the rate of 11 annas per cent. per mensem annually. In case of default in payment of interest, it shall be added to the principal, and I shall pay interest thereon as well at the aforesaid rate. I, or my heirs, or representatives, shall have no objection to it, nor shall I mortgage or sell the property to any other person **until the payment of the mortgage money** . . . In case of breach of promise and expiry of the stipulated period, the mortgagee shall become the absolute owner of the property mortgaged, and, I, or my heirs, or representatives, **shall have no objection whatever** . . . But if in any year I pay something towards principal in addition to the amount of interest, it will be not less than Rs. 500. I have, therefore, executed these few presents by way of a mortgage-deed by conditional sale, so that they may stand as authority and be of use when required.

The first point which stands out clearly is that for five years the rate of interest was defined with precision. Nowhere in the document is there any direct reference to what was to happen as regards interest if the mortgagor did not pay punctually or if in that event the mortgagee abstained from taking any proceedings for foreclosure. As regards default in payment of interest during the period between 1902 and 1907, he stipulates that he will not offer objection to interest being added to principal, and interest being paid on both, and in the same sentence he couples up a promise not to mortgage or sell the property to any other person until the payment of the mortgage money. A few lines above he had agreed to "continue" to pay interest at the rate of 11 annas per cent. per mensem annually.

It is difficult to believe that the parties could have had any other intention than that if the mortgagor failed to pay in December, 1907, the stipulations in the deed would remain in force and that the mortgagor would be bound to continue to pay interest at the agreed rate, calculated up to the time of tender or payment of principal and interest or the institution of a suit by the mortgagee. There is no suggestion that any lesser rate was agreed upon to come into force upon default. Nor is there any logical reason to think that the mortgagee would be willing for his money after 1907 to bear a smaller rate of interest. He could, on default, have commenced a suit, but he was not bound to do so. Dr. Sen, however, contends that on the 8th of December, 1907, the agreed interest at once stopped running and that there was, as between mortgagor and mortgagee, a definitely ascertainable debt, and that

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from that date the lender acquired a new and different right, namely, the right to bring a suit for foreclosure. We do not agree with this interpretation of the document and we are of opinion that the mortgagee's rights as regards principal and interest, as apart from proceedings against the property, continued. The first case to which we may refer is that of *Mathura Das* v. *Raja Narindra Bahadur* (1). In that case the material words of the deed were that the amount of the loan in full, principal as well as interest, would be paid within a year. It is said in the deed :—

> "Until the payment in full of this amount, principal and interest, I shall not transfer either directly or indirectly the mortgaged property to anyone else, and if I do, such a transfer shall be deemed to be false and inadmissible."

No payment was made, and some eight years after the deed the suit was commenced for the usual mortgage-decree. The Subordinate Judge passed a decree for the sum of Rs. 22,813. It was the amount of the principal alone with one year's interest; and, therefore, he disallowed the claim of the plaintiff to the remaining seven years' interest at the rate stipulated in the deed. The plaintiff came to the High Court and the decision of the Subordinate Judge was affirmed, and in that state of the case the plaintiff appealed to the Privy Council. Their Lordships held, without hesitation, that although there was no express term carrying on the obligation to pay interest at the agreed rate of 1-6 per cent. per mensem, that, nevertheless, there was an obligation upon the defendant to make that payment, and that on the ordinary construction of the words, they were in accordance with the usual intention of the parties to a simple mortgage. If, in the present case under consideration, on the ordinary construction of the words they are in accordance with the usual intention of the parties to a simple mortgage, as we believe them to be, we shall be coming to a right decision in holding that the defendants (appellants) must pay after the 8th of December, 1907, interest at the same rate as they had agreed to pay before that date. We are of opinion that this case of *Mathura Das* v. *Raja Narindra Bahadur* (1) is a very useful authority, which gives us clear and distinct guidance.

Now we come to the case of *Bindesri Naik* v. *Ganga Saran Sahu* (2), another Privy Council case, and again from

(1) (1896) I. L. R., 19 All., 39.
(2) (1897) I. L. R., 20 All., 171.

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a decision of this High Court. It possesses this additional advantage that the documents which came up for consideration were mortgages by way of conditional sale. When referring to the decision of this Court, their Lordships of the Privy Council said :—

"Their Lordships do not think that, according to the tenor of the mortgage-deeds, it was intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment."

Then after stating that the Judges of this High Court had confined their attention to a single passage in the document, rather than taking into consideration the whole provisions of the deeds, their Lordships continued —

"In the present case, by the deed of the 21st of August, 1875, it is stipulated in general terms that interest at 18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that in default of punctual payment at the end of each year, the creditors are to be at liberty to treat interest as principal and to recover it from the mortgaged property."

Therefore, in that case there being no express provision as to what were to be the mutual rights and obligations after the date fixed for payment, the rate of interest was held to continue throughout the currency of the whole liability.

Finally, we may refer to the case of *Narala Dasi* v. *Jogendra Narayan Basu* (1). In that case a mortgage-deed contained a covenant to pay principal and interest at a fixed rate in two years, and a further covenant not to transfer the mortgaged property until payment of principal and interest, and also on failure of payment of interest for one year to treat the amount after the lapse of that year as principal. The Calcutta High Court held, following the case of *Mathura Das*, that the obligation continued so long as the mortgage subsisted.

We are, therefore, of opinion that having regard to the terms of the whole document, its general tenor implies an obligation on the part of the borrower on the making of default to be liable for subsequent interest at the rate mentioned in the bond. There being no dispute as to the amount, we dismiss this appeal with costs.

Appeal dismissed.

(1) (1917) I. L. R., 25 Calc., 246